

# PREVENTING AND RESPONDING TO SEXUAL ASSAULT ON COLLEGE CAMPUSES

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## HEARING

BEFORE THE

SUBCOMMITTEE ON HIGHER EDUCATION  
AND WORKFORCE TRAINING

COMMITTEE ON EDUCATION  
AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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HEARING HELD IN WASHINGTON, DC, SEPTEMBER 10, 2015

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## **PREVENTING AND RESPONDING TO SEXUAL ASSAULT ON COLLEGE CAMPUSES**

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**Thursday, September 10, 2015  
U.S. House of Representatives,  
Subcommittee on Higher Education and Workforce  
Training,  
Committee on Education and the Workforce,  
Washington, D.C.**

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The subcommittee met, pursuant to call, at 10:01 a.m., in Room 2261, Rayburn House Office Building, Hon. Virginia Foxx [chairwoman of the subcommittee] presiding.

Present: Representatives Foxx, Roe, Salmon, Guthrie, Heck, Curbelo, Stefanik, Allen, Hinojosa, Jeffries, Adams, DeSaulnier, Davis, Courtney, and Polis.

Also present: Representatives Kline, Scott of Virginia, Bonamici, and Speier.

Staff present: Lauren Aronson, Press Secretary; Janelle Belland, Coalitions and Members Services Coordinator; Tyler Hernandez, Press Secretary; Amy Raaf Jones, Director of Education and Human Resources Policy; Nancy Locke, Chief Clerk; Brian Newell, Communications Director; Krisann Pearce, General Counsel; Lauren Reddington, Deputy Press Secretary; Alex Ricci, Legislative Assistant; Mandy Schaumburg, Education Deputy Director and Senior Counsel; Emily Slack, Professional Staff Member; Alissa Strawcutter, Deputy Clerk; Julianne Sullivan, Staff Director; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Jared Bass, Minority Education Policy Counsel; Tina Hone, Minority Education Policy Director and Associate General Counsel; Brian Kennedy, Minority General Counsel; Veronique Pluviose, Minority Civil Rights Counsel; Rayna Reid, Minority Education Policy Counsel; Michael Taylor, Minority Education Policy Fellow; and Arika Trim, Minority Press Secretary.

Chairwoman FOXX. Good morning, everyone. A quorum being present, Subcommittee on Higher Education and Workforce will come to order.

Welcome, everyone, to today's committee hearing. We are in a different location and we are a little tighter in here today than we normally would be, and ask everybody's indulgence as the renovation work goes on in the committee room. We will all be friendlier and kinder to each other today—and closer to each other.

I would like to thank our witnesses for joining us to discuss an issue that affects far too many students: campus sexual assault.

Earlier this week, as millions of students stepped foot on a college or university campus, members of Congress returned from their districts to continue their work strengthening America's higher education system. As we all know, that effort often requires difficult but necessary conversations about tough issues, which is why we are here today.

Every college student should be able to learn in an environment that is free—safe and free from fear and intimidation. Yet, for some students that is not the case.

According to one study, approximately one in five women in college has been sexually assaulted. Several universities, including Rutgers, Michigan, and MIT, report similar findings, and a number of recent high-profile cases further highlight the scope and seriousness of this important issue.

As a former community college president, mother, grandmother, I know I am not alone when I say that all of us have a responsibility to protect students from sexual assault on campus. As one university president exclaimed, "The issue of sexual assault keeps me awake at night. I feel personally responsible for the safety and well-being of all students." Another said, "I see the issue of sexual violence and sexual assault on colleges and universities as a matter of national importance."

Students, parents, educators, administrators, and policymakers across the country share this same sentiment and have joined a national conversation about these heinous crimes and how we can better protect students.

At the college and university level, efforts to prevent and respond to sexual assault are underway. For instance, some colleges and universities now require students to participate in seminars to help them understand what sexual assault is and how to prevent and report it. At the University of North Carolina Chapel Hill, for example, these seminars reinforce a safe campus culture and explain university policies and procedures for responding to reports of sexual violence.

Institutions are also improving how they support victims of sexual assault, providing resources and counseling services to help students recover from such a terrible event, complete their education, and continue with their lives. Just as important, administrators are working to put in a place a fair resolution process that respects the rights of the victim and the accused.

At the national level, the federal government has been working with colleges and universities to prevent and respond to sexual assault for decades. More recently, members of Congress have introduced legislative proposals intended to improve protections for college students. Additionally, the administration has established new policies institutions must follow.

Colleges and universities have rightly raised concerns about the administration's one-size-fits-all regulatory approach. While well-intended, the administration has further complicated a maze of legal requirements; added to the confusion facing students, administrators, and faculty; and made it harder for institutions to guarantee student safety.

As Dr. Rue will explain during her testimony, the patchwork of federal and state policies has impeded the efforts of administrators and educators to prevent and respond effectively to sexual assault on their campus.

As Congress works to strengthen higher education it must ensure tough, responsible policies are in place to fight these crimes and support the victims.

I am pleased to have a panel of witnesses to represent all sides of this difficult yet important discussion. Your observations and recommendations are vital to our efforts to help colleges and universities provide students the safe learning environment they deserve.

With that, I now recognize the ranking member, Congressman Hinojosa, for his opening remarks.

[The statement of Chairwoman Foxx follows:]

**Prepared Statement of Hon. Virginia Foxx, Chairwoman, Subcommittee on Higher Education and Workforce Training**

Earlier this week, as millions of students stepped foot on a college or university campus, members of Congress returned from their districts to continue their work strengthening America's higher education system. As we all know, that effort often requires difficult but necessary conversations about tough issues, which is why we are here today. Every college student should be able to learn in an environment that is safe and free from fear and intimidation. Yet for some students, that is not the case. According to one study, approximately one in five women in college has been sexually assaulted. Several universities – including Rutgers, Michigan, and MIT – report similar findings, and a number of recent high-profile cases further highlight the scope and seriousness of this important issue.

As a former community college president, a mother, and grandmother, I know I'm not alone when I say that all of us have a responsibility to protect students from sexual assault on campus. As one university president exclaimed, "The issue of sexual assault keeps me awake at night ... I feel personally responsible for the safety and well-being of all students." Another said, "I see the issue of sexual violence and sexual assault on colleges and universities as a matter of national importance."

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Colleges and universities have rightly raised concerns about the administration's one-size-fits-all regulatory approach. While well-intended, the administration has further complicated a maze of legal requirements, added to the confusion facing students, administrators, and faculty, and made it harder for institutions to guarantee student safety. As Dr. Rue will explain during her testimony, the patchwork of federal and state policies has impeded the efforts of administrators and educators to effectively prevent and respond to sexual assault on their campuses.

As Congress works to strengthen higher education, it must ensure tough, responsible policies are in place to fight these crimes and support the victims. I am pleased we have a panel of witnesses to represent all sides of this difficult yet important

discussion. Your observations and recommendations are vital to our effort to help colleges and universities provide students the safe learning environment they deserve.

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Mr. HINOJOSA. Thank you, Chairwoman Foxx.

I join you in welcoming our distinguished panel of witnesses.

The subject of this hearing is extremely sensitive. As ranking member of this subcommittee, I believe that we must raise the level of awareness in our communities and throughout our nation about the seriousness of campus sexual assault and its impact on our victims, both women and men, and their families. These impacts are far-reaching and include poor academic performance, stress, depression, and abuse of alcohol and drugs.

In addition to supporting the victim, we must also be sensitive to the rights of the accused. Institutions of higher education must have processes that ensure fairness in handling the allegations of campus sexual assaults and that campus investigations are consistent with our nation's longstanding principles of due process.

Whatever system is put in place, we must ensure that victims are not afraid to come forward. Unfortunately, many victims are reluctant to report sexual assaults because of shame, or fear of retaliation, or worries about lack of proof, uncertainty that what happened constitutes assault, or possibly because they lack information on where or how to report the assault, and fear of being treated poorly by the criminal justice system.

As a nation, we have made progress towards better understanding and addressing this serious challenge of campus sexual assault. For example, through the development of the White House Task Force to Protect Students from Sexual Assaults, the Department of Justice's Office of Violence Against Women developed a multiyear initiative to provide support to programs to prevent campus sexual assault and their recent online resource center for changing our campus culture.

In the year 2007, the U.S. Department of Justice also funded a groundbreaking study on campus sexual assault. The findings of that study were staggering. Let me give you some examples.

Among women in college, nearly 20 percent will be victims of attempted or actual sexual assault; as well, about 6 percent of undergraduate men. Most victims were violated in their first or second year at college. The majority, 75 to 80 percent, knew their attackers—often a friend, a classmate, acquaintance, or someone they dated.

The study also confirmed that the risk of campus sexual assault for undergraduate women increases greatly with the consumption of alcohol and/or drugs. It is clear, our concerted efforts are needed to deal with these serious issues.

In addition to these federal efforts, I am proud to report that my own home state of Texas is responding to calls of action. Starting this year, colleges and universities are required to inform students of campus sexual assault policies during freshmen orientation. Schools are also required to review and update those policies every 2 years.

Students returning to class at the University of Texas campuses this fall will also be participating in the nation's most comprehen-

sive study on sexual assaults ever conducted in higher education. The Cultivating Learning and Safe Environments case study will be led by researchers at U.T. Austin School of Social Work and will include online questionnaires for students; surveys and focus groups of faculty, staff, and campus law enforcement; and a 4-year cohort study of entering freshmen to identify the psychological and economic impact of sexual violence. The U.T. system is spending \$1.75 million dollars on this study.

So I applaud U.T.'s effort to address campus sexual assault and urge other colleges and universities throughout our country to join in the commitment to end sexual violence on their campuses.

In closing, let us renew our efforts to support victims of campus sexual assault. We can't wait for yet another high-profile incident to occur before we address this issue.

I look forward to hearing what recommendations our panel of witnesses may have to reduce sexual assault on our college campuses, and I thank you.

And with that, Madam Chair, I yield back.

[The statement of Mr. Hinojosa follows:]

**Prepared Statement of Hon. Rubén Hinojosa, Ranking Member,  
Subcommittee on Higher Education and Workforce Training**

Thank you, Chairwoman Foxx. I join you in welcoming our witnesses, Ms. Lisa Maatz, Mrs. Dana Scaduto, Mr. Joseph Cohn, and Dr. Penny Rue.

The subject of this hearing is extremely sensitive. As Ranking Member of this Subcommittee, I believe that we must raise awareness in our communities and throughout our nation about the seriousness of campus sexual assault and its impact on our victims both women and men and their families. These impacts are far reaching and include poor academic performance, stress, depression, and abuse of alcohol and drugs.

In addition to supporting the victim, we must also be sensitive to the rights of the accused. Institutions of higher education must have processes that ensure fairness in handling allegations of campus sexual assaults, and that campus investigations are consistent with our nation's long standing principles of due process.

Whatever system is put in place we must ensure that victims are not afraid to come forward. Unfortunately, many victims are reluctant to report sexual assaults because of shame; fear of retaliation; worries about lack of proof; uncertainty that what happened constitutes assault; or because they lack of information on where or how to report the assault; and fear of being treated poorly by the criminal justice system.

As a nation, we have made progress toward better understanding and addressing this serious challenge of campus sexual assault. For example through the development of the white house task force to protect students from sexual assaults, the department of justice's office on violence against women developed a multiyear initiative to provide support to programs to prevent campus sexual assault and their recent online resource center for changing our campus culture.

In 2007, the U.S. Department of Justice also funded a groundbreaking study on campus sexual assault. The findings of the study were staggering. For example: among women in college, nearly 20% will be victims of attempted or actual sexual assault, as will about 6% of undergraduate men. Most victims are violated in their first or second year at college. The majority -75% to 80%—knew their attackers — often a friend, classmate, acquaintance, or someone they dated. The study also confirmed that the risk of campus sexual assault for undergraduate women increases greatly with the consumption of alcohol and/or drugs.

It is clear our concerted efforts are needed to deal with these serious issues in addition to these federal efforts, I am proud to call for action. Starting this year, colleges and universities are required to inform students of campus sexual assault policies during freshman orientation. Schools are also required to review and update those policies every two years.

Students returning to class at the University of Texas campuses this fall will also be participating in the nation's most comprehensive study on sexual assaults ever conducted in higher education. The cultivating learning and safe environments

(class) study will be led by researchers at UT Austin's School of Social Work, and will include online questionnaires for students; surveys and focus groups of faculty, staff and campus law enforcement; and a 4-year cohort study of entering freshman to identify the psychological and economic impact of sexual violence. The UT system is spending \$1.7 million on this study.

I applaud UT's effort to address campus sexual assault and urge other colleges and universities to join in the commitment to end sexual violence on their campuses.

Let us renew our efforts to support victims of campus sexual assault. We cannot wait for yet another high-profile incident to occur before we address this issue. I look forward to hearing what recommendations our witnesses may have to reduce sexual assault on our college campuses.

Thank You, and with that, I yield back.

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Chairwoman FOXX. Thank you, Mr. Hinojosa.

Pursuant to committee rule 7(c), all members will be permitted to submit written statements to be included in the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow such statements and other extraneous material referenced during the hearing to be submitted for the official hearing record.

It is now my pleasure to introduce our distinguished witnesses.

Ms. Dana Scaduto is the general counsel at Dickinson College in Carlisle, Pennsylvania. Previously, she was in private practice in Harrisburg, Pennsylvania, where she chaired her firm's education law practice and represented several Pennsylvania private colleges, including Dickinson. Ms. Scaduto is an active member of the National Association of College and University Attorneys and a member of the Legal Services Review Panel of the National Association of Independent Colleges and Universities.

Dr. Penny Rue is vice president for campus life at Wake Forest University in Winston-Salem, North Carolina. Dr. Rue is responsible for the well-being and safety of Wake Forest University students and their education outside the classroom and is nationally known for her creative leadership in strengthening campus communities.

Ms. Lisa Maatz is vice president for government relations for the American Association of University Women, AAUW, here in Washington, D.C. Ms. Maatz previously spent 16 months serving concurrently as the interim director of the AAUW Legal Defense Fund. She has done similar work for the NOW Legal Defense and Education Fund and the Older Women's League.

Mr. Joseph Cohn is legislative and policy director at the Foundation for Individual Rights in Education, FIRE, in Philadelphia, Pennsylvania. He is a former staff attorney for the United States Court of Appeals for the third circuit and law clerk in the Philadelphia Court of Common Pleas. Immediately prior to joining FIRE, Mr. Cohn served as the interim legal director for ACLU affiliates in Nevada and Utah.

I now ask our witnesses to stand and raise your right hand.

[Witnesses sworn.]

Let the record reflect the witnesses answered in the affirmative. You may take your seat.

Before I recognize you to provide your testimony, let me briefly explain our lighting system. You have 5 minutes to present your testimony. When you begin, the light in front of you will turn

green; when 1 minute is left, the light will turn yellow; when your time is expired, the light will turn red. At that point, I will ask that you wrap up your remarks as best as you are able.

Members will each have 5 minutes to ask questions.

Now I want to recognize Ms. Scaduto for her comments.

Thank you.

**TESTIMONY OF MS. DANA SCADUTO, GENERAL COUNSEL,  
DICKINSON COLLEGE, CARLISLE, PA**

Ms. SCADUTO. Thank you, Chairwoman Foxx, and good morning. And good morning, Ranking Member Hinojosa and Chairman Kline.

I thank you for the opportunity to be here today. As a higher education senior administrator with a long history of involvement in the issue of sexual misconduct on our nation's campuses, I am here today because we share the committee's commitment to educating our nation's students in safe and supportive environments.

American colleges and universities are happy to work in partnership with the government and others on finding solutions that will help bring about cultural change and put an end to this most serious problem. As we move forward, I want to take a few minutes to share with you some of the challenges higher education is facing in our efforts and to propose some ways in which our government and this subcommittee can further help us achieve greater success in preventing and responding to sexual violence.

As I make my comments this morning, I will use the term "victim" out of expediency and because it is referenced in the Campus SAVE Act, but without any personal preference as to terminology.

First, please recognize that the reports of sexual violence we receive on our campuses are not straightforward or easy to resolve. The sexual violence claims we see most frequently do not involve force or attacks by strangers, but happen between individuals who are acquainted, where one or both are intoxicated, and where the primary issue is whether consent to a sexual act was given. We are left to resolve word-on-word conflicts between two people whose memories may be impaired and where there are no witnesses.

Add to this the fact that reports may not be made for days, weeks, or months following an event, and I can hope you see the complexity of resolving such issues in a manner that the parties believe to be fair.

And while speaking of fairness, colleges and universities are committed to providing fair treatment to all of our students, including not only victims of sexual violence but also to those accused of sexual violence. The changes over the last 4 years have resulted in complexities and challenges in maintaining the necessary balance.

For example, on a small campus, removing an accused student from a class in order to keep the student away from an alleged victim before any determination of responsibility can be made may result in the accused student being forced out of a class where there are no other sections or being forced out of a class shortly before graduation. We are also often trying to navigate the complexities of VAWA, Clery, and Title IX laws, regulations, and guidance, as well as state laws simultaneously and without the confidence that we can do so to the satisfaction of all.

Employees' duties to report under various standards differ. What and how we are supposed to advise victims of their options for moving forward when they report a sexual assault are just two examples of those complexities.

Additionally, the current laws and guidance do not appear to recognize that college disciplinary proceedings are not equipped to replace law enforcement or judicial functions. The members of our campus communities who are expected to meet and discharge the new standards established for resolving sexual violence claims are faculty, staff, and, historically, students—not judges nor lawyers.

To support colleges' and universities' efforts to improve culture around this serious issue and to help us in our efforts to hold violators accountable through processes that are fair, equitable, and impartial, I recommend the following four points for your consideration: First, pause in considering legislation that adds additional requirements to those already complex network of federal and state laws, regulations, and OCR guidance until there has been an opportunity to evaluate whether the efforts to date are working. As a reminder, the VAWA regulations only went into effect July 1st of this year.

Second, consider creating a safe harbor for higher education that does not relieve us from accountability for failures to comply, but which provides us with certain presumptions of good faith when reviewing our conduct. For example, when we are applying fact-based tests established by various laws, such as in deciding whether to investigate or not over a victim's objection, if we miss the mark but are found to have acted in good faith in our efforts, provide us with protection from penalties or administrative action.

Third, if new requirements are considered at some point in the future, OCR should follow notice and comment requirements of the Administrative Procedures Act. The Title IX guidance put into place since 1991—since 2001 was done without notice or comment from parties outside the agency, depriving colleges and universities, victims and survivors, and other interested parties of the opportunity to provide input that may have been helpful in improving clarity and alignment with existing laws and regulations.

I will leave my fourth point for your reading.

Thank you for listening and considering my perspective as a higher education administrator.

[The testimony of Ms. Scaduto follows:]

Institutional Challenges in Responding to Sexual Violence  
On College Campuses

Testimony Provided to the  
Subcommittee on Higher Education and Workforce Training  
Committee on Education and the Workforce  
United States House of Representatives

Dana Scaduto  
September 10, 2015

Thank you for the opportunity to before the U.S. House Subcommittee on Higher Education and Workforce Training. I come here today as a higher education senior administrator deeply committed to the education of our nation's students in safe and supportive environments. I serve as campus counsel to a wonderful institution, Dickinson College; and I have both the privilege and benefit of longstanding and deep collaboration with general counsels from scores of our nation's colleges and universities of all types and sizes. In recent years, my collaboration with them – a dedicated, experienced and incredibly informed group – has been heavily skewed toward discussions of sexual violence. In 2013-2014, I had the privilege of serving as a negotiator in the rulemaking process to implement the amendments to the Violence Against Women Act and the Clery Act.

My higher education colleagues and I have thought long and hard about campus policies and procedures that may help achieve compliance with the fast growing array of laws, regulations and guidance presented to us as our institutions and the nation as a whole tackles a deeply concerning issue. Thus, being invited to discuss with this subcommittee the issue of sexual violence is a conversation I am prepared to have. The views I represent today are my own and do not necessarily represent the views of the trustees or the administration of Dickinson College.

Unfortunately, over my long career, I have been involved in numerous student legal and disciplinary matters involving issues of sexual violence. My heartfelt wish is that there will come a day when there will be no more need for that on the part of my successor. I know that everyone in this room has the same wish for every campus across the country, large and small, public and private. I know, too, that that this wish is shared by everyone in the Department of Education, its Office for Civil Rights, the Department of Justice and the White House. Indeed, it is a wish shared by our entire society.

No one, though, has the perfect solution for how to get this done. That's why we are here today, and it is my hope that we will have occasions in the future to be together again. Because there is no quick fix. We need to be in this for the long haul. I know my fellow counsel across the country are; I know my colleagues at Dickinson are.

Sexual violence is a societal problem; not just a college problem. While colleges can assist, we must recognize that conduct and cultural norms emanate from the greater community. While FBI statistics indicate that the rate of sexual assault was higher for nonstudents than for students, colleges and universities can and must do our part to address this most serious societal issue.<sup>1</sup>

<sup>1</sup> U.S. Depart of Justice, *Rape and Sexual Assault Victimization Among College –Age Females, 1995-2013* (December 2014)

Over the last four and a half years, Congress and the Administration have focused additional and much needed light on the issue of sexual violence, including dating and domestic violence and stalking. There has been a great deal of guidance coming from the Department of Education's Office for Civil Rights and from amendments to laws, including the Violence Against Women Act, and new regulations implementing those laws. There are additional bills pending, such as the Campus Safety and Accountability Act (CASA), the Hold Accountable and Lend Transparency Act (HALT), and the Safe Campus Act (SCA). Many states have also begun to enact legislation and regulations aimed at addressing sexual assault and interpersonal violence on college campuses. All of these laws and guidance are aimed at improving the climate and culture on the campuses of our nation's colleges and universities and we as leaders on our campuses are willing and eager partners in undertaking additional steps to combat this most serious problem.

Combating sexual assault and interpersonal violence requires institutions of higher learning to be both proactive and reactive, in meaningful and effective ways. That last phrase is critically important. None of us should want our colleges and universities to just "do something." We want them to do something that works. Something that really works. Indeed, given the national conversation about the high costs of a college education, the last thing Congress should want is to saddle institutions with obligations to undertake, and pay for, programs and initiatives that do not yield meaningful results. There is great hope that education and prevention programs, such as bystander intervention and healthy relationship workshops, will help to reduce sexual assault and interpersonal violence. But do we know what we need to know about the efficacy of these programs? We don't-not yet.

Our colleges and universities are great places for finding solutions to problems. Colleges and universities across the country are actively engaged in the research and evidence based inquiry that can and will lead to better sexual assault and interpersonal violence prevention and response programs. But our institutions must have the freedom to explore a wide range of potentially effective solutions that may work on particular campuses based on their particular characteristics – not have solutions dictated to them that assume all campuses are the same. We must recognize that one size does not fit all and not all institutions have the resources necessary to engage in this kind of research. Congress and the U.S. Department of Education can and should play an important role in funding research regarding successful prevention and response programs and in making those programs available as possible tools to be used by colleges and universities throughout the country. Give our institutions of higher education the means, space and resources to do what we do best: research, test efficacy, and share what we learn to the betterment of students everywhere and society as a whole.

When an assault is reported, we must support the victim/survivor with a wide array of services and resources while, at the same time, ensuring that our college and university disciplinary systems and procedures are fair to all involved. We must provide reporting options; a fair and impartial investigation; prompt and equitable resolution; and appropriate sanctions and remedies that eliminate a hostile environment, prevent its recurrence and address its effects on the individual and the community. Colleges and universities are expected to serve in a variety of roles – as advocates for victims/survivors, trained investigators, and impartial decision makers that provide an equitable process for the accuser and the accused - in short all things to all people involved. Even when we do these things well and, I believe, many institutions are doing them well; either the accused or the accuser (and sometimes both) feel profoundly aggrieved by the process and the outcome. In many instances this spawns complaints to OCR or litigation (or both) which results in agency or judicial review and criticism of institutional processes and procedures.

It is about these particular challenges that I wish to speak to you today. There are several things that have proved particularly problematic in meeting all of the enhanced expectations for the handling of sexual misconduct on our campuses -- all of which colleges and universities are endeavoring to address in accordance with regulatory and agency guidance. My list of concerns is by no means exhaustive but I believe that by sharing and discussing even some of the challenges we face as a result of the legislative and administrative expectations, we can improve the way forward as Congress and administrative agencies continue to work with higher education to make our campuses safer, empower and inform our students about issues which are at the core of prevention such as consent and create a climate of respect to which all are entitled and which all can enjoy.

Unfortunately, the legal requirements imposed on institutions for responding to and resolving reports of sexual assault over the last four years have created challenges for colleges and universities in meeting our obligation to be fair and impartial in our dealings with all of our students, including accusers and those accused. Both parties involved in a sexual encounter are members of the same university community. While providing support to a victim/survivor -- and encouraging others to come forward -- is a critical first step in effectively dealing with an assault situation, a number of the requirements for on-campus resolution of such complaints challenge our commitment to fairness and equity to both students involved.

**1. The context of sexual assault claims that colleges and universities are expected to resolve are neither clear cut nor easy.**

We know that children grow up in a world where exposure to sex and sexualized behavior is everywhere -- on TV, on billboards, in movie theaters and throughout the on-line world. This reality is unlikely to change. By the time children have become young adults and arrived on our campuses, they know or at least believe they know a lot about sex. According to CDC statistics from 2013, 47% of high school students have already had sexual intercourse before even starting college. That's a fact worth talking about, and worth keeping in mind as we consider what's to be done about eliminating sexual violence on our campuses. It's highly questionable whether most students arriving on our campuses know or understand what a healthy sexual encounter or sexual relationship is regardless of whether they have experienced sex.

There's another trend that seems unlikely to change anytime soon. Among young adults today, sex has become more casual. A sexual encounter between college students or between two people who meet online or in a bar often occurs between casual acquaintances who have not gone out on a single date or who may have just met, and the parties may have no expectation of meeting a second time.

Another significant issue: generally, one or both partners has been consuming alcohol and each has expectations in his or her mind about what comes next. According to a study of claims made over a three year period to United Educators, a larger insurer of institutions of higher education, alcohol is involved in 78% of sexual assaults, and this number includes consumption by the accused, the victim/survivor or both. Alcohol and sex, particularly casual sex, are quite frankly a recipe for disaster.

**2. Colleges and universities are best at education and are not suited for being proxies for courts of law.**

There is no question that the national culture around sex is a fundamental reason this issue is justly receiving so much attention. Colleges and universities have always been a place where cultural

norms have been tested and shifted - whether around civil rights or our country's role in war. As educators, we recognize our leadership role in educating our students about their rights and responsibilities, the consequences of their choices and their rights to feel and be safe in whatever situation they find themselves. This includes education around the issue of sexual and interpersonal violence. Because this is what we do well. We educate.

Conducting education and providing information is an area where college officials have vast experience. We must redouble our education efforts on sexual assault, and institutions are moving aggressively to do this. But performing investigations and resolving cases is a far more difficult and murky challenge. We are not courts of law. We do not have the authority to subpoena witnesses, and control evidence. Our disciplinary and grievance procedures were designed to provide appropriate resolution of institutional standards for student conduct, they were never meant to adjudicate misdemeanors, let alone felonies.

The most common claims of sexual assault we encounter on our campuses are not the clear cut physical force or stranger rape cases. They are claims arising from behavior occurring behind closed doors between two students acquainted with each other but who do not know each other well and both of whom may be under the influence of alcohol. While there is no doubt that regrettably sexual assaults can and do occur under these conditions, it is the question of whether consent was given, withdrawn or possible that frames the central issue in the majority of situations we review.

We take our obligations to the victims/survivors of sexual assault very seriously and are fully aware of our responsibilities with respect to sexual assaults, yet our on-campus disciplinary processes are not proxies for the criminal justice system, nor should they be. Nonetheless, the expectations set by VAWA and OCR have converted campus restorative justice systems into quasi-court systems. We are expected to move forward with resolution of criminal cases of sexual assaults in part because the criminal justice system has been found wanting by victims/survivors and many public officials. The vast majority of fact patterns in an on-campus sexual assault are cases that the police and district attorneys around the country decline to prosecute. Constitutional protections afforded to criminal defendants and ambiguous fact patterns make successful prosecution elusive. In a typical campus sexual assault case, colleges must navigate between conflicting word-on-word accounts where there are no eye witnesses, little or no physical evidence, and judgments and memories impaired by alcohol or drugs. Most often, the fact of intercourse is not at issue. It is about consent. The challenges we face in resolving these cases are compounded by the impact of trauma, which may result in reporting delays, wavering levels of participation with campus procedures, and a reluctance to seek law enforcement action through the criminal justice system.

3. **Vague, unclear, complex and inconsistent language creates uncertainty; it is difficult to explain and nearly impossible to understand.**  
American colleges and universities look at the laws, regulations and guidance surrounding sexual violence as a package. Over the last four and a half years, the Department of Education's Office for Civil Rights has issued multiple letters providing guidance on how it expects colleges and universities to address sexual violence. This guidance, which has not been subjected to any kind of notice or comment period, is binding. There have been amendments to the Violence Against Women Act and Clery and their related regulations. The White House itself has begun setting expectations and offering assistance. We are dealing with a very complex set of mandates and expectations, attempting to better address education and response, improve support for victims/survivors, increase accountability for offenders and keep and maintain safe and secure environments in which

to educate our students. Yet, the real work of college faculty, staff, administrators, coaches, counselors and security officers occurs in the trenches, and in the moment. Campus lawyers are on a daily basis trying to reconcile differences between language related to Title IX, VAWA, Clery and potentially CASA, HALT and/or SCA, and explain it in clear, simple ways that will be recalled and appropriately applied when the need arises. Addressing the multitude of varying laws and other requirements is one of the most significant challenges we face. We want to get it right in order to serve the needs of our students, but doing so is becoming increasingly complex; even when we make our best possible efforts that are responsive to laws, regulations and guidance. It seems we are never doing quite enough and yet before the effectiveness of our efforts can be assessed, another layer of complexity is added.

One example: Title IX designates a category of college employees as “responsible employees” with a specific set of responsibilities for reporting sexual violence. Clery designates certain employees, but not the same group of employees as designated under Title IX, as “Campus Security Authorities” with a set of reporting responsibilities that differs from Title IX. It’s either not easy or sometimes near impossible to reconcile the complexities of law and agency mandates.

As a second example, under Title IX, colleges and universities are required to advise victims/survivors of their rights to report an incident of sexual assault to outside law enforcement authorities while Clery requires that we advise victims/survivors of their right not to report. It is unclear what distinction was intended. It’s quite possible that advising a victim/survivor of the right not to report to law enforcement (under the theory of allowing the victim/survivor to control the situation) could put institutions in some states at odds with their students because of the institutions’ own duties under state law to report all felonies to law enforcement authorities. We also know that advising victims/survivors of their right not to report has been used as evidence against institutions to support claims that we are sweeping sexual assault “under the rug.” Please make no mistake; our strong belief collectively is that law enforcement should be involved. But if, when and how to notify law enforcement, especially when the victim/survivor does not want to involve law enforcement, is a virtually impossible legal landscape to navigate.

Closely related to this second example are the challenges we have faced over the last few years in how to reconcile the vast array of conflicting laws and agency guidance. Colleges and universities are very concerned that despite their best efforts to follow all applicable laws and guidance, simultaneously achieving full compliance with all federal and state laws and administrative guidance is not possible, is resource intensive and exposes us in nearly every case to legal issues from victims/survivors, respondents, and OCR, and undermines public confidence in our educational institutions. The creation of safe harbors for where colleges are making good faith efforts to meet the requirements of conflicting provisions would be a welcome relief.

4. **A number of expectations established over the last four years appear to fail to recognize the diversity and variety of U.S colleges and universities, complicating the compliance efforts of institutions.**

A number of the requirements established by OCR and recent regulations related to prevention, education and responding to sexual violence appear to make the assumption that all college students attend large, four-year residential institutions. In fact, only approximately 20% of college undergraduates reside on campus. In addition, many students attend smaller institutions that are unlikely to have the administrative resources of their larger counterparts—nearly 2,000 degree-granting institutions in this country enroll fewer than 1,000 students. And increasingly, students are

taking their coursework online rather than attending classes in person, so their interaction with others on an actual campus may be very limited. Expectations for training and prevention education clearly are different depending on the character of an institution.

Complicating the compliance efforts further is the fact that colleges and universities vary greatly in their administrative sophistication. The array of institutions that comprise American higher education, from major research universities to small liberal arts colleges to community colleges to for-profit schools, differ enormously in their levels of expertise and resources available to fulfill their obligations. Notably, fewer than 60% of colleges have general counsels on staff, and almost none have independent investigatory arms. The training requirements for investigators and outcome decision-makers -- the adequacy of which have not been clarified by OCR or the Department of Education -- have forced many institutions to turn to costly outsourcing arrangements such as retaining the services of former prosecuting attorneys as investigators, former judges and lawyers as decision-makers, and high-priced consultants to develop training and response programs. The hope is that such measures might improve compliance with the expectations of laws and guidance where our duties following an assault arise but there is a tradeoff. We have diluted, if not lost, the responsibility for the integrity of our own campuses. Ownership of decision-making has been moved outside our campus communities. Moreover, the use of funds in these ways diverts them from enhanced education and prevention programming, the kind of work in changing culture that we as educators do best, and the kind of the work that will have longer reaching impact if successful.

One-size-fits-all mandates that fail to account for these differences undermine the valuable goals that the regulations and guidance are intended to achieve. There are several provisions in guidance and regulations that are irrelevant or unworkable for institutions without a residential population and, even more, for institutions without a campus. How, for example, could training on-line students who never set foot on a campus meet the objectives of the laws? Can institutions define students differently? Does an adult learner who takes one continuing education class but does not live on a residential campus require the training that traditional 18 year old students in residence halls do? Can we use data from past experience to determine whether these subpopulations pose a threat to the safety and well-being of others?

5. **Students are now permitted to bring "advisors of their choice" to meetings and hearings related to the resolution of claims of sexual violence, changing the dynamic considerably.**  
College discipline processes have historically had vastly different objectives from those of the criminal justice system. They have existed to establish and maintain community standards of conduct; not to substitute for the criminal and civil courts. In fact, many institutions have not allowed non-members of their communities to participate in discipline matters preferring instead to require responding students to address their conduct in a decidedly non-legal manner where the goal was recognizing one's responsibility for misconduct, accepting accountability (where appropriate) and learning from the experience. In some cases of sexual assault, this teachable moment has often involved separation from the institution. With the introduction of advisors of choice to our sexual misconduct resolution processes, several dynamics have changed. First and foremost, there is now the potential that one student may have the assistance of an attorney in working his or her way through the resolution process and the other will not, potentially resulting in real inequities between the parties. This can have the unintended consequence of intimidating an unrepresented victim/survivor, for example. Colleges and universities recognize and understand

this potential for unfairness but we cannot afford to shoulder the burden of balancing this issue no matter how much we might want to. Second, the traditional hearing board model where community members (faculty, staff, students) review situations and potentially hold one of their own accountable is a far less appealing responsibility to community members who now have to confront lawyers in the process. In requiring that attorneys be allowed into our hearings, how can institutions without counsel be prepared to deal with the specialized expertise such individuals bring on behalf of their clients?

**6. Removing students from hearing boards fails to recognize the value of peer accountability.**

Recent OCR guidance has strongly discouraged colleges and universities from including students in their resolution proceedings. As recognized by a number of student government presidents from numerous colleges and universities, this is a genuine loss of a valuable perspective. In all my years of representing institutions of higher education, I have not seen a student representative on a hearing board breach the confidentiality of the process or do anything other than take his or her responsibility very seriously. I have also watched as students held their peers to higher standards of conduct than faculty and staff were initially inclined to do. This is so because the accused and the student hearing board member live in the same community. The student panelist is more familiar with student community norms than faculty and staff. In today's climate where our students are better educated and better trained about the institution's and the law's expectations around sexual assault, student hearing officers would be even better ambassadors for what is acceptable and not acceptable on our campuses. Regrettably, colleges and universities have been discouraged from utilizing this valuable resource.

**7. Required use of preponderance of the evidence as the standard for determining responsibility.**

Colleges and universities have historically used their conduct resolution processes to resolve violations in an educative manner. We establish internal behavioral norms for our communities and hold one another accountable for violations of community standards. Resolving violations of these norms is not the resolution of criminal charges although much of the conduct with which we deal might also violate state laws, such as underage consumption, destruction of property, and assault. We hope to encourage student accountability and use the experience as a growth opportunity for the individual involved. We know that some violations of our accepted standards of conduct, such as sexual assault, mean that a student cannot remain in our community. The most serious sanction we can impose is separation - whether for a period of time (suspension) or permanently (expulsion). Given the significance of ending someone's relationship with his or her college, many institutions prefer to use a higher burden of proof, such as by clear and convincing evidence, before they are confident that separation is the appropriate remedy. Other schools believe that given the nature and character of their communities and their resolution systems, the preponderance standard is better suited to their objectives. While the VAWA/Clery regulations do not dictate what standard an institution must use before determining responsibility, OCR has clearly indicated that the preponderance measure must be used. There are genuine concerns being expressed by some schools about whether this preponderance standard is appropriate and whether using it might violate the duty of those institutions to treat their students fairly. In short, there are strong arguments to make for using either standard and rather than dictating to a campus community from among at least two responsible choices, colleges and universities need the flexibility to decide which standard best serves the needs of their distinct communities. At a minimum, no standard for such an important issue should be established before a notice and comment period that allows all parties on all sides to express their points of view.

**8. Clarity is needed about the purpose of changes to college disciplinary processes.**

The requirements of VAWA, Clery and Title IX have changed the character of college disciplinary systems. In some respects, our internal resolution proceedings now look more like criminal proceedings -- accusers and those who are accused may now have counsel; we are discouraged from having students serve as decision-makers in our processes presumably in favor of more experienced individuals. High standards have been set for the training requirements of investigators and decision-makers that are difficult for many institutions to meet. Detailed new rules dictate how notice of meetings and hearings must be given, how our disciplinary hearings and appeals are to be conducted and the manner in which outcomes must be communicated. Interim measures to keep an accused and an accuser away from one another must be put into place; not unlike restraining orders.

Colleges and universities are straining to understand what role Congress, the Administration and OCR believe institutions should legitimately fill. If it is to provide an alternative to the criminal justice system, we strongly urge reconsideration. We are not equipped for such responsibility and this is not what we are. Our resolution systems are comprised of educators, not lawyers. Many of those who participate in the resolution of conduct violations are "volunteers" whose primary roles at our institutions are as faculty and administrators. Meeting the training requirements established under the sexual violence laws has caused many schools to outsource the investigative and resolution functions to trained lawyers and judges. The sense of accountability to one's peers and the institution that comes from an internal review of conduct is being substantially diminished.

We are the colleges and universities for all of our students -- men and women, accuseds and accusers -- and we are committed to processes that are fundamentally fair, unbiased and balanced for all. Historically, our processes have run parallel to the criminal justice system; not replaced it. There has always been a separate responsibility for colleges and universities to act to protect the members of our communities on our campuses regardless of what happened in the criminal justice system; not to supersede it. We have done so using educative and restorative justice models. Simply put, we are good at education and at using our conduct systems for educative outcomes. We are not nearly as good at adjudicating crimes and doing so is not at the core of our mission. Only the police, the prosecutors and the courts have the training to handle sexual assaults from a criminal perspective. We need clarity from lawmakers about the role we are now being asked to fill or to be relieved of the responsibility in favor of the workings of the justice system.

**Are there solutions?**

Higher education is committed to addressing effectively the issue of sexual violence on college campuses. We acknowledge and support the efforts by a variety of constituencies -- victim/survivors, advocacy groups, the U.S. government, state governments, this committee, and our own institutions -- to come together to confront the problem. As educators, we are committed to enhancing the education and training of our students and employees, supporting the active engagement of our community members on one another's behalf in stopping sexual misconduct before it happens, supporting victims/survivors when something does happen and holding those responsible accountable. We believe that emphasizing training and education is the most effective strategy for addressing this problem. Finding solutions to some of the challenges addressed in this testimony that would allow us to allocate our energy and resources to the prevention side rather than the discipline side would enhance this effort.

Right now, colleges and universities are struggling to address a number of complexities and challenges presented by Title IX and VAWA/Clery. VAWA and Clery have been amended and updated through legislation and the negotiated rulemaking process. The negotiated rulemaking process brought together individuals of various perspectives and backgrounds with the Department of Education. That group carefully and thoughtfully considered and proposed regulations to enact the amendments to the statute. Currently, however, there are no comparable regulations under Title IX. All of the standards and expectations that have been set over the last four years are the result of subregulatory guidance issued in letters to the higher education community. Our efforts to seek clarity and transparency from OCR have gone largely unanswered.

In the reauthorization of the Higher Education Act, I urge Congress to consider requiring that the negotiated rulemaking process be used to develop Title IX regulations pertaining to issues of sexual assault. A part of that rulemaking process should be the consideration of changes that could align Title IX with VAWA and Clery—a step that would greatly facilitate compliance on college campuses. Bring together representatives of the various stakeholders in this fight to change culture around sexual violence and to draft regulations that can effectively implement changes to Title IX.

Some of the points that merit consideration during the reauthorization process might include the following:

1. Clarifying the goals and purposes of the resolution requirements imposed by VAWA, Clery and Title IX;
2. Aligning training, education and prevention requirements to compatible standards that recognize the flexibility that schools of various sizes and character need in educating their students on issues like consent and capacity;
3. Creating clear, transparent expectations for OCR investigations, including published standards that are used by the agency in campus investigations, the deference OCR should give to the decisions of campuses on sexual assault determinations when based on acceptable evidence and done in compliance with stated standards, and by establishing a timeframe within which OCR must complete its investigation. (Currently, campuses are expected to complete investigations of allegations of sexual assault in as close to 60 days as we can but OCR has kept investigations at some schools open for up to four years);
4. Creating a safe harbor under Title IX and VAWA/Clery that will provide colleges and universities support when they are addressing the requirements of conflicting state and federal laws simultaneously by creating a presumption that institutions are acting in good faith in their compliance efforts;
5. Clarifying that students can participate in conduct proceedings;
6. Undertaking to address the significant role that drugs and alcohol play in sexual assault.
7. Recognizing the diversity of higher education institutions and acknowledging there are multiple pathways for effective education, prevention and response to sexual assault.

We are aware that there is new legislation pending in both the House and the Senate that seeks to further support victims/survivors, address perpetrator behavior and hold colleges accountable if they fail to do so. We should be held accountable if we aren't effectively responding to sexual violence. But our efforts to meet the expectations of Congress, the Department of Education and the White House will be enhanced with recognition of our commitment to doing so in a climate that is fair and unbiased for all of our students and with greater flexibility that will make a substantial difference in the safety of our campus communities. Let's take the time to assess the effectiveness of the changes that have occurred over the last four years before we add more compliance requirements to the mix. And let's try to consolidate what we already have into a process that is simpler and more likely to meet the needs of our students.

The presidents, boards and administrations of colleges and universities across the country are deeply committed to ensuring a safe, supporting and responsive culture around the issue of sexual assault, as well as the other myriad issues that affect our students and our campuses. But changing culture will not happen overnight. It is a journey that will be most effective if we move toward it collaboratively rather than reactively. Higher education would welcome a place in future discussions about these important issues.

Chairwoman FOXX. Dr. Rue, you are recognized for 5 minutes.

**TESTIMONY OF DR. PENNY RUE, VICE PRESIDENT FOR CAMPUS LIFE, WAKE FOREST UNIVERSITY, WINSTON-SALEM, NC**

Ms. RUE. Thank you, Chairwoman Foxx, Ranking Member Hinojosa, and honorable committee members, for the opportunity to testify about this critically important issue.

The higher education community takes the problem of campus sexual assault very seriously, and we are working diligently to prevent sexual assault and to manage systems fair to all students. These are not new issues for us. It has been a priority for decades because of our genuine care for the health, safety, and well-being of our students.

Currently, we must address sexual violence compliance responsibilities under a swirl of regulations. This one-size-fits-all can create resource challenges that impede our effort to prevent and respond to sexual assault. Added to these challenges now are state legislatures that are enacting statutes, creating a patchwork of conflicting regulations.

Prevention and education efforts are critical to reducing incidents of sexual violence. Many campuses employ online modules, allow new students to participate in prevention programming at orientation and beyond, and beyond, online training programs to educate faculty and staff to whom students might report about where to turn.

According to the CDC, bystander intervention training and social norms training are promising practices but have not yet been validated through rigorous design, so more grant support is needed to conduct evaluation research in this growing field.

At Wake Forest we use PREPARE peer educators to deliver highly interactive, situational programs to put incoming students' attitudes to the test and really get them to think. A highly engaging peer theater program reinforces those messages and is followed by an online curriculum that uses scenarios highly relevant to students. This program, Haven, will also give us benchmark attitudes that we can use to assess the effectiveness of our programs over time.

After students have time to navigate the social scene, they will participate in a program in their residence halls on bystander intervention training using the Step-Up model.

Campus climate surveys are another growing practice. These are used to assess students' perception of and experience with sexual violence, and these surveys are designed to provide an institution-specific picture that in turn enables leaders to coordinate with the campus community to strengthen prevention efforts.

One standardized survey imposed on all institutions would likely not accommodate the wide array of campus environments that range from 4-year residential, like my own, to community colleges and even primarily online universities. Each institution should have the autonomy to develop the best survey, given benchmarks to hit.

Although prevention strategies are in place, sexual violence will still occur on our campuses. Student affairs administrators are

committed to being fair and balanced to all of our students engaged in the conduct process.

Critical to this process is the widely established practice of confidentiality for the victim and the accused, one of the primary reasons that a student will choose an on-campus practice over reporting to the police.

One of our most important points in trauma-informed work is to allow the survivor the right to choose the path to follow in the wake of an incident. Some may want to report to the campus, some may want to report to the police, or both. Some may only want support.

The institution really needs to respect that choice. To take the decision out of the victim's hand by mandating that a report of sexual violence to campus automatically is turned over to the police will create a chilling effect on the willingness of victims to come forward, exactly the opposite of what we want to happen.

The confidentiality of our conduct processes guaranteed under FERPA creates uncertainty about their fairness—we know that—most recently towards the respondent. But it is important to reiterate the campus processes are carefully structured to be fair and equitable to all parties.

In the recent Washington Post Kaiser Family Foundation poll, 84 percent of current and recent college students said they are very or somewhat confident in the school administration's ability to address complaints.

We are not a court of law. Ours is an educational process intended to arrive at a fair and equitable outcome for all parties. At the core of this distinction is our standard of scrutiny, preponderance of the evidence.

I think I speak for most colleges and universities in saying that we do not need more regulation; we need more consultation. Guidance from the Department of Education coming without notice often does not help us navigate these waters.

I strongly believe it is important to provide opportunities for public comment and discussion where the full complexity of the issues can be explored from those who know them firsthand.

In closing, I must express deep concern about the narrative from the media that colleges and universities care more about their institution's reputation than the rights and experiences of our students. Nothing could be further from the truth.

Instead, those of us who handle incidents of sexual violence are professionals who share an overwhelming commitment to strike the delicate balance in today's legislative environment to preserve the educational rights of students, to manage fair and equitable conduct systems, and above all, to prevent sexual violence.

Thank you, Chairwoman.

[The testimony of Ms. Rue follows:]

Prepared Statement by

Dr. Penny Rue

Vice President for Campus Life

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Before the

United States House of Representatives

Subcommittee on Higher Education and Workforce Training

On

Combating Sexual Assault on College and University Campuses

Washington, DC

September 10, 2015

Thank you Chairwoman Foxx, ranking member Hinojosa, and honorable committee members for the opportunity to testify about the critically important issue of combating sexual assault on our nation's college and university campuses. The focus of my testimony will be on identifying areas of concern in the existing legislative and regulatory landscape as well as to share a few snapshots of a larger national picture of college and university efforts to reduce incidents of sexual assault and other forms of gender-based violence on campus.

I think we would all agree that it is a national priority to develop strategies that reduce incidents of sexual violence in our colleges and universities. The effect of sexual assault and gender-based violence is devastating to a student's personal and academic life. Once a man or woman is a victim of a sexual assault, it can affect all aspects of their life. As a result, I think we would also agree that solutions, and strategies that address sexual assault allow the victim to decide how when and if they report the sexual assault and provide support throughout the process. It is also vitally important that the processes to resolve and respond to a reported sexual assault be fair and equitable for both the victim and the accused. Unfortunately, the higher education community is in the untenable position of trying to accomplish these priorities in the midst of often conflicting and confusing legislative and regulatory

requirements from a wide range of federal, state, and local stakeholders.

Currently, colleges and universities in the United States must address compliance responsibilities under FERPA, the Clery Act, the Campus SaVE Act provisions of VAWA, regulatory guidance on Title IX from the Department of Education Office of Civil Rights, and recommendations from the White House Task Force on Sexual Assault, to name just a few. The problem is that legislative and regulatory developments too often ignore best practice, enact a one-size-fits-all approach to what is a very complex issue, and create real resource challenges that impede our efforts to prevent and respond to sexual assault. Added to these challenges are state legislatures that increasingly insert complexity to our task by enacting statutes that interfere with the Title IX rights of victims.

The good news is that the higher education community takes the problem of campus sexual assault very seriously, and we are working diligently to establish systems that are both victim-centered and fair to all students. This is not a new issue for colleges and universities. I established my first Sexual Assault Working Group at Georgetown University over 20 years ago. Effectively addressing sexual assault and gender-based violence has been a priority for decades. The professionals who do my work, who serve in student affairs, do this work because of a genuine care for the health, safety and well-being of our students. It is also important to acknowledge that sexual assault is a societal issue that has root causes that go well beyond the college campus. We fully understand our obligations to support our students who experience sexual assault, but our firmest goal is to prevent incidents of sexual assault, so that far fewer students would have to experience that trauma while enrolled in college.

One recent poll conducted by the Washington Post and Kaiser Family Foundation of current and very recent college students provides great insight into the landscape of sexual assault on campus. I'm going to highlight just a few findings that combat the current media hype that colleges just don't get it.

71% of students say the university administration is doing enough to prevent sexual assault on campus

73% say that students take the school's sexual assault prevention programs seriously or somewhat seriously

84% say they are very or somewhat confident in the school administration's ability to address complaints of sexual assault fairly

#### First Prevention is the Key

Prevention and educational efforts will be critical to reduce incidents of sexual violence on college campus. Virtually all campuses are employing some range of educational program as part of their prevention efforts. Many campuses employ online education modules that reach all students, and others require new students to participate in programming at orientation. Online training programs are also available to faculty and staff to provide education on their sexual assault reporting obligations under Title IX. The CDC studied over 140 program evaluations of sexual assault prevention programs in a study

published in January 2014. They found that using rigorous control group-study design, no college program had been proven effective, but two had been found promising using less rigorous methods—Bystander intervention training and social norms training. More support is needed to conduct evaluation research in this growing field.

Bystander intervention is a strategy to provide students, faculty, staff, and other members of the campus community with the awareness, skills, and ability to speak out against rape myths and intervene in a moment of potential sexual violence. Bystander intervention teaches skills that help peers intervene in situations that might lead to an incident of sexual violence and encourages students to confront statements and actions that normalize or trivialize sexual assault. In the Post/Kaiser Foundation poll, 91% of students affirmed the likely effectiveness of this strategy. Social Norms refer to the acceptability of an action or belief, and that training challenges misperceptions that affect behavior.

At Wake Forest, we use PREPARE peer educators to deliver highly interactive, situational programs to put incoming student's attitudes to the test and really get them to think. A highly engaging peer theatre program reinforces those messages and is followed by an on line curriculum that uses scenarios that are highly relevant to students. Our on line training program, Haven, will give us benchmark student attitudes that will be used to help assess the effectiveness of our programs. Mid-semester, after they have had time to navigate the social scene, they will participate in a program on Bystander Intervention Training using the Step-Up model co-developed by the NCAA and the University of Arizona.

Campus Climate surveys are another growing practice, and these are used to assess students' perceptions of and experiences with sexual assault or other forms of gender-based violence on campus. Since such a small number of sexual assaults are actually reported, it is important for each campus to understand, through an anonymous survey, the number of students who have experienced a sexual assault, sexual harassment, stalking or other forms of gender-based violence, as well as providing data on attitudes that can be used to shape prevention efforts. Through these campus climate surveys will campuses be able to both understand the scope of the problem on their campus and to measure over time the effectiveness of their prevention efforts. These surveys are designed to provide an institution-specific picture that, in turn, enables leaders to coordinate with the campus community to strengthen prevention efforts in strategic and proactive ways.

What is less helpful is the notion that one standardized survey would be imposed on all institutions by the federal government. This approach does not accommodate the wide array of campus environments or recognize the diligent work of the institutional community to address their own unique needs and challenges. Each institution should have the autonomy to develop the best survey for their campuses and their students. American higher education is fortunate to have a wide range of colleges and universities that range from four-year residential, to community colleges to primarily on-line colleges. One mandatory campus climate survey will not meet the needs of each college or university, and the regulatory burden will siphon resources away from prevention and support initiatives.

Although prevention strategies are in place, we must also face the reality that sexual violence will still occur on our campuses. Student Affairs administrators have consistently taken seriously the need to be

fair and balanced to all of our students engaged in the conduct process. When sexual violence occurs, and the survivor reports the incident to begin the campus' conduct process, we start off with the common understanding that the process needs to be fair and equitable for all parties involved. Critical to this process is the widely established practice of confidentiality for the victim and the accused. It is also important to note that both the victim and the accused are provided with impartial advisors to help them understand options and navigate the campus judicial system.

To uphold a fair and balanced system that also supports our responsibilities under federal law, we first and foremost want to affirm the right of the victim to determine the path she or he wants to pursue with a report of sexual violence. Some may only want to report on campus, whereas others may want to report either or also to the police. But let's not forget that some victims may only want support. Whatever she or he chooses as the preferred course of action, the institution needs to respect the victim's choice. Not doing so, or, worse, taking the decision out of the victim's hands by mandating that a report of sexual violence to a campus official automatically be turned over to local law enforcement inserts the very real threat that victims may be coerced out of seeking the support or protection they may need. Mandatory reporting will create a chilling effect on the willingness of victims to come forward - exactly the opposite of what we hope happens. The Post/Kaiser Foundation poll included many interviews with victims. Many chose not to come forward because of the perceived social costs of doing so.

Increasingly, the public has expressed concern for the rights of the accused. It is important to reiterate that campus processes are carefully structured to be fair and equitable for all parties. The bottom line, however, is that these cases are often very difficult and almost never clear cut. In a perfect world, we would not have to address sexual violence. But the higher education community does have to address sexual violence, and it is clear that our commitment to addressing sexual violence is shared by government leaders and the public. To this end, I wish to offer suggestions for combatting campus sexual violence fairly and equitably.

It is imperative that campuses maintain control of the conduct process. This responsibility enables trained campus professionals to uphold our duty under federal law to ensure equal educational opportunity for all students. Often, this means that we must have the capability to employ remedies that allow the victim to continue her or his study without encountering the accused in the classroom, residential communities, or other campus facilities.

The student conduct process is not a court of law. The campus conduct system has never been a replication of the court system because the aims of each are vastly different. Ours is an educational process intended to arrive at a fair and equitable outcome for all parties. At the core of this distinction is our obligation under Title IX to use preponderance of the evidence as the standard of scrutiny in determining responsibility for accusations of sexual assault – not the more rigorous standard to prove guilt beyond a reasonable doubt. Campuses should not be held accountable for the failures of the judicial system to achieve justice in criminal sexual assault cases.

In addition, I think I would be speaking for most college and university representatives by sharing that we

do not need more regulation, particularly if these actions are imposed upon the higher education community without warning or consultation. Too often, guidance from the Department of Education Office for Civil Rights comes without notice or the opportunity to comment on its merits, and their guidance is often administered by the department as if it had the force of law. A more positive example is the negotiated rulemaking that took place for the implementation of the Violence Against Women Act reauthorization, where key stakeholder groups came together to ensure that provisions were appropriately suited for campus environments. The Campus SaVE Act provisions have been very helpful to the higher education community in clarifying the roles of victim advocates.

Should government officials seek to issue new regulations or guidance, I strongly believe it is important to provide appropriate opportunities for public comment and discussion. To this end, I think I would also be speaking for college and university representatives by stating that we do not need one-size-fits-all policy solutions to what, in reality, is a very complex issue on our campuses. Instead, prevention strategies that accommodate diverse institutional characteristics will have a greater likelihood of delivering on their intent.

Lastly, as someone who has worked in higher education for 40 years, and who has worked alongside numerous colleagues who share an unwavering commitment to all students, I must express deep concern about the narrative from the media and federal agencies that colleges and universities care more about their institution's reputation than the rights and experiences of victims. I cannot stress more vehemently how wrong that assertion is. Instead, those of us who handle incidents of sexual violence on campus are professionals who share an overwhelming commitment to strike the delicate balance in today's legislative and regulatory environment to preserve the educational rights of victims, to manage fair and equitable conduct systems, and above all to prevent sexual violence.

Respectfully submitted,

Dr. Penny Rue

Vice President for Campus Life

Wake Forest University

Chairwoman FOXX. Thank you very much, Dr. Rue.  
Ms. Maatz, you are recognized for 5 minutes.

**TESTIMONY OF MS. LISA M. MAATZ, M.A., VICE PRESIDENT  
FOR GOVERNMENT RELATIONS, AMERICAN ASSOCIATION  
OF UNIVERSITY WOMEN, WASHINGTON, D.C.**

Ms. MAATZ. Good morning. On behalf of the more than 170,000 members—is that on? There we go.

Good morning.

On behalf of the more than 170,000 members, over 1,000 branches, and almost 900 colleges and university partners of the American Association of University Women, I thank you for inviting us to testify today. My remarks are informed by my 12 years with AAUW as well as my tenure as the executive director of Turning Point, a domestic violence program recognized for excellence by the Ohio Supreme Court; and also at Wittenberg University, where I was a hall director and ran a women's center that responded to incidents of sexual assault. I can personally attest to the fact that this is not a new problem.

When campus environments are hostile because of sexual harassment and violence, students can't learn. It is that simple and that devastating.

Schools have an important and necessary role to play in addressing this epidemic. Why? Because student rights to an education free of sex discrimination are on the line.

AAUW has long identified the need to end sexual harassment and violence on campuses. Our own research revealed that nearly two-thirds of college students experience sexual harassment.

Just this year, a national poll found one in five women said they had been sexually assaulted in college. This issue impacts both men and women and students from all walks of life at all types of schools.

Title IX and the Clery Act provide the very tools schools need to improve campus climates for everyone.

Passed in 1972, Title IX is a gender-neutral law that prohibits sex discrimination in federally funded education programs. The law requires schools to take steps to eliminate sexual harassment and violence, prevent their recurrence, and address their impacts on individual students and the entire campus. This includes evaluating current practices, publishing anti-discrimination policies, and implementing grievance procedures providing for a prompt and equitable resolution of complaints.

Schools must also provide accommodations to students, such as adjusting housing arrangements and class schedules and providing academic support—actions that schools are uniquely situated to provide.

All schools should have a Title IX coordinator to oversee these activities as well as monitor patterns and address systemic problems. It is important to note that these requirements are not new, but date back to the law's first regulations back in 1975. Since then, over the course of Republican and Democratic administrations, the Department of Education has continued to provide technical assistance and guidance that promotes compliance with the law.

Schools also follow a consumer protection law known as the Clery Act. It requires colleges and universities that participate in federal financial aid programs to disclose crime statistics and security information.

Originally passed in 1990, Congress updated the Clery Act in 2013 as part of a bipartisan reauthorization of the Violence Against Women Act. These updates require schools to report additional crime statistics on domestic violence, dating violence, and stalking, and provide ongoing sexual assault prevention and bystander intervention training campus-wide. This public report of a school's safety efforts is valuable to students and parents and provides insight to schools working to improve campus safety.

Title IX and the Clery Act are longstanding complementary laws that work together to ensure that students and schools have a clear course of action when sexual violence occurs. Appropriately, schools are not in the business of imposing criminal punishments. Those decisions are best left to authorities in charge of criminal investigation and prosecution if a survivor chooses to pursue that course.

The school's civil rights proceedings and any criminal investigation represent parallel yet equally necessary paths. Laws and legal precedence spell out clear requirements for schools to be prompt, fair, and impartial in all disciplinary proceedings, and Title IX echoes these due process requirements.

Similarly, the Clery Act requires that school processes be prompt, fair, and impartial, and that both parties receive timely notice regarding the outcomes of proceedings.

There are next steps that Congress can take to help assist schools and students in their efforts to end sexual harassment and violence. We know that the time immediately following an incident is especially critical for survivors.

They need access to a safe space, medical and counseling—medical care and counseling, and information about their rights and where they can seek additional support. Schools should also ensure an advisor is available to connect survivors to all of these resources.

The AAUW-supported Survivor Outreach and Support Campus Act, or the SOS Campus Act, would ensure schools take these critical steps.

In addition, climate surveys can help schools better to understand the dynamics behind reported and unreported incidents of sexual violence. Schools need information in order to effectively combat this epidemic. When done well, climate surveys provide transparency that is crucial for student safety and a useful tool to help schools fine-tune their response.

The AAUW-supported HALT Campus Sexual Violence Act would also require surveys at all schools.

Finally, we urge Congress to provide additional resources for the Department of Education to support Title IX coordinators and other stakeholders on relevant laws and best practices. There are schools that are working diligently to respond to incidents of sexual violence, and technical assistance can help them make real change.

Further, with more attention to sexual violence we have also seen an uptick in complaints, and an unprecedented number of schools are under investigation for Title IX compliance. The Office

for Civil Rights needs additional funding to provide ongoing technical assistance for schools, as well as to hold bad actors accountable.

We all believe, I think, that a single incident of sexual violence is one too many. When it interferes with students' education it adds insult to injury.

But we have the tools to make real change, and AAUW looks forward to working with you as you reauthorize the Higher Education Act and consider this important topic.

Thank you.

[The testimony of Ms. Maatz follows:]



Testimony of Lisa M. Maatz, Vice President of Government Relations  
American Association of University Women (AAUW)

House Committee on Education and the Workforce  
Subcommittee on Higher Education and Workforce Training

Hearing on Preventing and Responding to Sexual Assault on College Campuses  
September 10, 2015

On behalf of the more than 170,000 bipartisan members and supporters, over 1,000 branches, and almost 900 college and university partners of the American Association of University Women (AAUW), I want to thank you for inviting me to testify at today's hearing on the topic of "Preventing and Responding to Sexual Assault on College Campuses." AAUW is the nation's leading voice promoting equity and education for women and girls. Since our founding in 1881, AAUW members have examined and taken positions on the fundamental issues of the day — educational, social, economic, and political. As early as 1945, AAUW was studying the impact of sex discrimination on college campuses. In 1972, we were instrumental not only in winning passage of Title IX but also in securing the subsequent regulations to aid compliance with the law. Today AAUW continues to fight for gender equity in education through research, legal case support, fellowships and grants, and advocacy.

My remarks today are informed by my 12 years working at AAUW, and several years at the NOW Legal Defense and Education Fund (now called Legal Momentum) and the Older Women's League (OWL). My remarks are also informed by my tenure as Executive Director of Turning Point, a domestic violence program recognized for excellence by the Ohio Supreme Court, and at Wittenberg University, where I was a hall director and ran a campus-based women's center that responded to incidences of campus sexual violence. Despite our current and welcome national conversation on this issue, I can attest to the fact that this is not a new problem.

When campus environments are hostile because of sexual harassment and violence, students cannot learn — and they miss out on full educational opportunities as a result. It's that simple, and that devastating. Colleges and universities have an important and necessary role to play in addressing this epidemic. Schools' role in responding to campus sexual assault is essential because students' civil rights — the opportunity to pursue their educations free of sex discrimination — are on the line.

Reauthorizing the Higher Education Act (HEA) provides an opportunity to help stem the tide of campus violence by further updating federal policies. Congress can not only guide colleges and universities in supporting students, but also provide strong incentives for these institutions to improve their campus climates for all.

Today I hope to provide you with information about the current laws that shape schools' responses to sexual violence as well as additional steps Congress can take to help end sexual violence. Smart schools understand that laws like Title IX, successfully implemented, provide the very tools they need to improve campus climates for everyone. It's on all of us to keep the spotlight bright to help ensure that all schools have the information and assistance they need to follow the law and protect students' civil rights.

AAUW has long identified the need to end sexual harassment and violence on college campuses. Our own research revealed that nearly two-thirds of college students experience sexual harassment.<sup>1</sup> A 2007 campus sexual-assault study by the U.S. Department of Justice found that around 28 percent of women are targets of attempted or completed sexual assault while they are college students.<sup>2</sup> And just this year, a national poll found that one in five women said they have been sexually assaulted in college.<sup>3</sup> This issue impacts men and women, students from all walks of life, and students at all types of schools.

#### **Title IX**

Title IX of the Education Amendments of 1972 is the federal law that prohibits sex discrimination in federally funded education programs. It covers all aspects of sex discrimination from the well-known inclusion of women in athletics programs, to the rights of pregnant and parenting students, and to the topic of this hearing: sexual harassment and violence. Title IX applies to students throughout their time in school – from elementary school through their postsecondary education. Since Title IX's passage in 1972, all federal agencies with educational programs have developed and issued regulations to implement and support the statute. In addition, the U.S. Department of Education has regularly provided technical assistance and guidance to support schools in their compliance with the law.

Title IX protects students from sex discrimination in all of a school's programs or activities, whether they take place in the facilities of the school, at a class or training program sponsored by the school at another location, or elsewhere. Sex discrimination includes the continuum of sexual harassment and violence. Title IX is a gender-neutral law, protecting both female and male students from sexual harassment regardless of who the harasser may be.<sup>4</sup> Title IX requires schools to evaluate their current practices, adopt and publish a policy against sex discrimination, and implement grievance procedures providing for prompt and equitable resolutions of student and employee discrimination complaints. Under Title IX, schools are required to take steps to eliminate sexual harassment and sexual violence, prevent their recurrence, and address their impacts not only on individual students but the campus community as a whole.<sup>5</sup> This requirement is not new. Further, these rules have been reiterated time and time again to schools through guidance, regulations, and technical

assistance.

Title IX and its guidance require schools to do several commonsense things. Schools must have and distribute a policy that defines sex discrimination (which includes sexual harassment and violence) and states that the school does not discriminate.<sup>6</sup> In addition, schools must develop, implement and publicize procedures for students to file complaints when sex discrimination (including sexual harassment and violence) takes place. Both federal law and good conscience require schools to take action to remedy harassment when it occurs and to prevent its recurrence. This includes accommodations for students to adjust housing arrangements, rearrange class schedules, and receive academic support – key actions that schools are uniquely and best suited to provide. This also includes administrative and disciplinary action according to the school's anti-discrimination policies where appropriate. Also, schools must appoint a Title IX coordinator to oversee these activities, review complaints, and consistently address patterns or systemic problems – even when there are not formal complaints. Schools must regularly notify students of the coordinator's name and contact information, as well the non-discrimination policy itself.<sup>7</sup>

In order to ensure schools understand their responsibilities under Title IX, the federal government has developed supporting regulations and guidance. In recent years, the U.S. Department of Education has provided technical assistance to schools in the form of Dear Colleague letters, an extensive “questions and answers” document, and a resource guide to support and inform Title IX coordinators.<sup>8</sup> These documents have been developed throughout the years, over the course of Republican and Democratic administrations, to reflect and answer the variety of questions from schools across the country. In addition, the White House Task Force to Protect Students from Sexual Assault, which includes the U.S. Departments of Education and Justice as well as other relevant agencies, has recently developed an excellent hub of resources and best practices at the web site [NotAlone.gov](http://NotAlone.gov). The U.S. Department of Education's Office for Civil Rights also initiates proactive compliance reviews and responds to complaints – from students on both sides of campus proceedings – when schools may be failing to meet their Title IX obligations.

### **The Clery Act**

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act) requires colleges and universities that participate in federal financial aid programs to disclose campus crime statistics and security information.<sup>9</sup> Every school must provide this information publicly. Currently, sexual assaults that are reported to campus security and local law enforcement are included in these disclosures.<sup>10</sup>

In 2013, Congress reauthorized the Violence Against Women Act (VAWA) and included AAUW-supported provisions to improve campus safety. Schools are now required to report additional crime statistics (on domestic violence, dating violence, and stalking), review and update procedures following an incident of sexual violence, and provide prevention and bystander intervention training to all students and employees. The statistics and policy disclosures required by the Clery Act all serve an important purpose – they are a public

compilation of the efforts the school is making on all safety issues, not just sexual violence. Such information is not only of critical interest to students and parents, but also serves as a regular check-up the school can use to fine tune their policies and practices. The new prevention and awareness education programs required by the Clery Act have the potential to shift campus culture and change attitudes regarding sexual violence.

Congress passed the Violence Against Women Reauthorization Act of 2013 with updates to the Clery Act by large bipartisan margins in both chambers. Following passage, the regulations for the Clery Act provisions were developed and adopted through a negotiated rulemaking of a diverse group of stakeholders who worked through complex issues and came to consensus in support of the final rule.<sup>11</sup> These new campus provisions are only just being implemented (as of July 1, 2015), and AAUW is looking forward to both their positive impact as well as the lessons of implementation that could lead to future improvements to the law.

The Clery Act requirements are in addition to the longstanding obligations that schools have under Title IX. These laws work together to ensure that students have the information they need regarding campus safety, as well as a clear course of action when sexual violence occurs. They also provide school administrations with critical information that allows them to continually monitor and inform their campus safety policies, procedures, and practices.

#### **Equity and Fairness During Disciplinary Proceedings**

Existing laws and court precedents spell out clear requirements for colleges and universities to be fair during disciplinary proceedings on campus. These requirements are not just about proceedings following an incident of sexual harassment or violence – they reflect the rights of students in all disciplinary proceedings.

In *Goss v Lopez*, the U.S. Supreme Court made it clear that students must receive notice of disciplinary charges and that there must be a hearing where both sides are heard.<sup>12</sup> In *Dixon v Alabama State Board of Education*, the 5th Circuit Court of Appeals held that in a situation where the possible punishment included expulsion from a public institution of education, students must receive notice of the disciplinary charges and grounds for possible expulsion, the names of witnesses and a report of the facts to which each witness testifies, and a hearing where both sides are heard in detail and the accused student can present his or her own defense. *Dixon* does not require the right to cross-examine, nor secure counsel, confront and cross-examine witnesses, or call witnesses.

It is important to recognize that the due process rights of all parties are strictly enforced in any administrative proceeding. Just as important, Congress should reject any attempts to contravene established court precedent on the weight of evidence required to maintain a civil claim of sex discrimination. Such interference could have the perverse result of making it more difficult for rape survivors to obtain relief than other types of claims in administrative proceedings. Schools should never be excused of their Title IX obligations by simply making these claims more difficult for survivors.

The Clery Act reflects these requirements, restating that whatever disciplinary proceedings occur following a campus incident of sexual assault, domestic violence, dating violence, and stalking must be “prompt, fair, and impartial,” and that both parties receive timely notice regarding the outcomes of proceedings.<sup>13</sup> In addition, Title IX ensures that – whatever process is used to resolve complaints of sexual harassment and violence – it must be “adequate, reliable, impartial, and prompt and include the opportunity for both parties to present witnesses and other evidence.”<sup>14</sup>

Current law requires schools to respond to campus sexual assault because students' civil rights are on the line. But, schools also have a role in addressing sexual harassment and violence on campus because they are best equipped to provide interim measures and accommodations. Accommodations such as class schedule or housing changes are necessary to survivors' ability to complete their education. Schools are also best situated to assess and remedy such incidents, in an administrative setting and according to their established student codes of conduct and anti-discrimination policies. Appropriately, schools are not in the business of imposing criminal punishments. Those decisions are best left to the authorities in charge of criminal investigation and prosecution, if a survivor chooses to pursue that course. The school's civil rights investigation and any law enforcement criminal investigation represent parallel and equally necessary paths.

Current laws that outline these requirements, such as Title IX and the Clery Act, must be protected. Such provisions serve as an important backbone that supports survivors who simply seek to complete their educations.

#### **Next Steps to End Sexual Harassment and Violence**

There are improvements Congress can make to help guide and assist colleges and universities in their efforts to end sexual harassment and violence on campus. We know that the time immediately following an incident is critical for survivors – they need access to a safe space, to medical and/or counseling care, and would benefit from knowing where they can seek additional support and resources. Schools should follow a best practice that ensures there is an advisor or liaison available to connect survivors to all of these important resources. The AAUW-supported Survivor Outreach and Support Campus Act (SOS Campus Act) would require this of colleges and universities. Schools would establish an independent, on-campus advocate to support survivors of sexual assault. Advocates would connect survivors with resources including emergency and follow-up medical and counseling care, how to report to law enforcement if they so choose, and information about legal rights on campus and off.

In addition, we know that state sexual assault coalitions and community-based rape crisis centers stand ready to work with colleges and universities using the best practices they have developed through years of experience. Formalizing partnerships with these groups to ensure crisis intervention, services, education, and training would be a smart move for any school seeking to support survivors on campus while not reinventing the wheel.

Resources to do so are available at the White House Task Force to Protect Students from Sexual Assault's website [NotAlone.gov](http://NotAlone.gov).<sup>15</sup>

Implementing a climate survey would provide schools with a better understanding of both reported and unreported incidents, as well as contributing cultural factors on campus. Very simply, schools need information in order to effectively combat this epidemic. Climate surveys also provide a counterbalance to incentives to hide reported incidents in low annual crime statistics to avoid looking "unsafe." By demonstrating that a campus is coming closer to having all incidents reported, asking why some incidents aren't, and working to reduce the overall number of incidents, schools provide additional transparency that is crucial for student safety and wellbeing and, quite frankly, an excellent good faith move to show student and parents that the school is facing this nationwide problem head on. For the information to be useful beyond a single campus, surveys must ask some of the same questions and have similar methodologies. This is why coordination of such a survey on the federal level is important to its success. Such coordination also ensures that both good actors and bad actors participate. The AAUW-supported Hold Accountable and Lend Transparency on Campus Sexual Violence Act would require such a survey. AAUW encourages the committee to continue to collaborate with stakeholders regarding the best approach to requiring climate surveys on campus.

Finally, AAUW urges Congress to provide additional appropriations that support schools in educating students, faculty, and staff – particularly Title IX coordinators, as well as training the appropriate administrators on the relevant laws and best practices. Not all schools are bad actors and resources and technical assistance can help them make real change. For the first time ever, this coming year, the U.S. Department of Education will have access to the names and email addresses of Title IX coordinators at every school. This means improved opportunities for communication and technical assistance. But, we have also seen that with more attention to the issue there has also come an increase in the need for enforcement action by the Department.<sup>16</sup> While many schools are working diligently to respond to incidents of sexual violence, as of August 19, 131 schools were under investigation by the U.S. Department of Education's Office for Civil Rights regarding their compliance with Title IX.<sup>17</sup> These investigations stem from complaints as well as proactive compliance reviews. Unfortunately, the U.S. Department of Education's Office for Civil Rights has staffing levels today that are almost 15 percent below levels 10 years ago and more than 50 percent below levels over 30 years ago. The Office for Civil Rights needs additional funding to be able to provide ongoing technical assistance to schools and to hold bad actors accountable.

A single incident of sexual violence is unacceptable. When it interferes with students' education, it adds insult to injury. We must do everything we can to stop it, and we have tools to make a real difference. Thank you again for the opportunity to testify during today's hearing. AAUW looks forward to continuing to work with you to tackle the issue of campus sexual violence during the process of reauthorizing the Higher Education Act.

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- <sup>2</sup> Christopher P. Krebs, Ph.D.; Christine H. Lindquist, Ph.D.; Tara D. Warner, M.A.; Bonnie S. Fisher, Ph.D.; Sandra L. Martin, Ph.D. (December 2007). The Campus Sexual Assault (CSA) Study, Final Report. NII Grant No. 2004-WG-BX-0010. [www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf)
- <sup>3</sup> Washington Post. (2015). *Poll: One in 5 women say they have been sexually assaulted in college.* [www.washingtonpost.com/graphics/local/sexual-assault-poll/](http://www.washingtonpost.com/graphics/local/sexual-assault-poll/)
- <sup>4</sup> U.S. Department of Education. (September 2008). Sexual Harassment. [www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf](http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf)
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- <sup>6</sup> U.S. Department of Education. (April 2011). Dear Colleague Letter. [www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf](http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf)
- <sup>7</sup> U.S. Department of Education. (April 2015). Title IX Resource Guide. [www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf](http://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf)
- <sup>8</sup> AAUW members and activists have taken action to deliver these resources to over 700 schools across the country. AAUW. (2015). Deliver New Title IX Resources to Your Local Schools. [www.aauw.org/resource/titleixdelivery/](http://www.aauw.org/resource/titleixdelivery/)
- <sup>9</sup> Clery Center for Security on Campus. *Summary of the Jeanne Clery Act.* [clerycenter.org/summary-jeanne-clery-act](http://clerycenter.org/summary-jeanne-clery-act)
- <sup>10</sup> U.S. Department of Education. *Campus Safety and Security Data Analysis Cutting Tool.* [ope.ed.gov/security/](http://ope.ed.gov/security/)
- <sup>11</sup> Negotiators included communities of interest such as: Students, Legal assistance organizations that represent students, Consumer advocacy organizations, Campus safety advocates, Mental Health Services, Institutional campus safety officials, Institutional student affairs/disciplinary divisions, Institutional centers for women, lesbian, gay, bisexual, and transgendered individuals, Institutional attorneys, Minority serving institutions and other Title III institutions, Two-year public institutions, Four-year public institutions, Private, non-profit institutions, Private, for-profit institutions. U.S. Department of Education. (2014). List of negotiators. [www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-negotiators2014.pdf](http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-negotiators2014.pdf)
- <sup>12</sup> Goss v. Lopez (1975) 419 U.S. 565
- <sup>13</sup> 20 U.S.C. 1092 (f)(8)(B)(iv)
- <sup>14</sup> U.S. Department of Education. (April 2014). [www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf](http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf)
- <sup>15</sup> White House Task Force to Protect Students from Sexual Assault. Building Partnerships with Local Rape Crisis Centers: Developing a Memorandum of Understanding [www.notalone.gov/assets/mou-rape-crisis-centers.pdf](http://www.notalone.gov/assets/mou-rape-crisis-centers.pdf)
- <sup>16</sup> U.S. Department of Education. (April 2015). Protecting Civil Rights, Advancing Equity: Report to the President and Secretary of Education, Under Section 203(b)(1) of the Department of Education Organization Act, FY 13-14. [www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf](http://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf)
- <sup>17</sup> Richmond Times Dispatch. (August 19, 2015). *VCU under federal scrutiny for sexual assault handling.* [http://www.richmond.com/news/local/education/article\\_71d9f8b3-72d9-562f-a0e6-39e011c41a50.html](http://www.richmond.com/news/local/education/article_71d9f8b3-72d9-562f-a0e6-39e011c41a50.html)

Chairwoman FOXX. Thank you.  
Mr. Cohn, you are recognized for 5 minutes.

**TESTIMONY OF MR. JOSEPH COHN, LEGISLATIVE AND POLICY DIRECTOR, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, PHILADELPHIA, PA**

Mr. COHN. Chairwoman Foxx, Ranking Member Hinojosa, honorable members of the subcommittee, and members of the committee at large, thank you for the introduction.

I am the legislative and policy director at the Foundation for Individual Rights in Education, or FIRE. We are a nonpartisan, non-profit organization dedicated to defending student and faculty civil liberties on America's college campuses. I thank you for the opportunity to discuss this critical issue.

One of the core constitutional rights that FIRE defends is due process. Universities are both morally and legally obligated to respond to known instances of sexual assault in a manner reasonably calculated to prevent its recurrence. And for more than 50 years, courts repeatedly have held that the Constitution requires public institutions to provide meaningful due process protections to accused students.

FIRE believes that these twin obligations need not be in tension. Access to higher education is critical. The stakes are extremely high for everybody in campus disciplinary proceedings and it is essential that no student's education is curtailed unjustly.

While efforts to address campus sexual assault have focused on eliminating bias against complainants, far too little attention has been placed on preventing bias against the accused. And even more insufficient attention has been placed on addressing what I call the competency gap—the difference between what college administrators are equipped to do and what the Department of Education's Office for Civil Rights is demanding of them.

Campuses are ill-suited to adjudicate allegations of sexual assault. While colleges and universities have a role to play in tackling the issue, we must make sure that we are assigning them responsibilities they are capable of performing well.

Having defended campus due process for 15 years, FIRE is convinced that colleges are simply unequipped to serve as investigators and fact-finders in these challenging issues.

Rape is a crime. It should be treated as such. Using amateur systems is insulting to victims and disastrous to fundamental fairness.

Unsurprisingly, injustice for both victims and accused is commonplace.

Sound public policy requires adjudicating these cases in courts after professional investigations. Only courts have the power to take violent predators off the streets. After all, a student has been expelled but not jailed is free to commit rape again.

Complicating matters further, in the April 4, 2011 dear colleague letter, which OCR did not subject to public notice and comment as required under the Administrative Procedure Act, the agency mandated that institutions adjudicate sexual assault cases using the low preponderance of the evidence standard. OCR, while well-intentioned, has done more harm than good in this arena.

Since issuing the 2011 DCL, OCR has conducted over 130 Title IX investigations, several of which have resulted in settlement agreements. To the best of FIRE's knowledge, only one such investigation is looking into whether the disciplinary process is biased against the accused. The resulting perception of top-down federal bias against the accused is inescapable.

I would like to briefly address three bills currently pending before Congress: the Campus Accountability and Safety Act, CASA; the Safe Campus Act; and the Fair Campus Act. There are aspects of each that FIRE supports and there are provisions in each that give FIRE pause.

On the positive side, all three bills aim to increase the involvement of law enforcement. If our goal is to implement a serious response to a serious problem, involving professionals in the criminal justice system is necessary.

FIRE has multiple concerns about CASA, chief among them the fact that the bill provides no meaningful due process protections for the accused. None.

Conversely, the Safe Campus Act and Fair Campus Act both include important procedural safeguards that will benefit accused students and complainants alike. What is more, both the Safe Campus Act and the Fair Campus Act would repeal OCR's preponderance of the evidence mandate, provide the complainant and respondent crucial rights to active assistance of counsel, and require institutions to turn over inculpatory and exculpatory evidence to both sides.

To encourage more complainants to report allegations to the proper authorities, the Safe Campus Act prohibits institutions from taking action on complaints unless they choose to report the allegation to law enforcement. FIRE agrees that punitive measures should be waived if a complainant does not report the accusation to law enforcement for investigation. However, we strongly urge Congress to amend the language so that non-punitive measures and accommodations may still be made available regardless of the student's decision to report.

While colleges have proven incapable of competently determining the truth or falsity of felony accusations, they are well-equipped to secure counseling for alleged victims, provide academic and housing accommodations, secure necessary medical attention, and provide general guidance for students as they navigate the criminal justice system. Institutions should perform these functions regardless of the complainant's decision to report the incident. The bill should be amended to encourage them to do so.

I provide a more detailed analysis of the bills in my written testimony to the committee.

To sum up, there is no simple solution to the problem of sexual assault on campus, but lowering the bar of finding guilt and eliminating criminal due process protections—by doing that, we are creating a system that is impossible for colleges to administer fairly. Congress can help reverse this trend by taking all student interests into account. To accomplish that, Congress should include the best aspects of each pending bill in a comprehensive, balanced measure.

Thank you again for the opportunity to address you, and I look forward to answering your questions.

[The testimony of Mr. Cohn follows:]



September 10, 2015

Chairwoman Virginia Foxx  
U.S. House Committee on Education and the Workforce  
Subcommittee on Higher Education and Workforce Training  
2181 Rayburn House Office Building  
Washington, D.C. 20515

Ranking Member Ruben Hinojosa  
U.S. House Committee on Education and the Workforce  
Subcommittee on Higher Education and Workforce Training  
2181 Rayburn House Office Building  
Washington, D.C. 20515

**Re: Preventing and Responding to Sexual Assault on Campus**

Dear Chairwoman Foxx, Ranking Member Hinojosa, and honorable members of the Committee:

The Foundation for Individual Rights in Education (FIRE; [thefire.org](http://thefire.org)) is a nonpartisan, nonprofit organization dedicated to defending student and faculty rights on America's college and university campuses. These rights include freedom of speech, freedom of assembly, legal equality, due process, religious liberty, and sanctity of conscience—the essential qualities of individual liberty and dignity.

FIRE thanks the Committee for dedicating the time to address the issue of sexual assault on campus. To supplement the oral testimony I provided at today's hearing, below please find a detailed overview of FIRE's concerns regarding the adjudication of allegations of sexual assault on campus and our analysis of relevant legislation pending in Congress.

**I. Solutions Must Take the Rights of All Students Into Account**

As we explained in our Comment to the White House Task Force to Protect Students From Sexual Assault ("Task Force"), due process rights are one of FIRE's core concerns. *See* Attachment A. While there is no doubt that institutions of higher education are both legally and morally obligated to effectively respond to known instances of sexual assault, public institutions are also required by the Constitution to provide meaningful due process to the accused. *Goss v. Lopez*, 419 U.S. 565, 584 (1975); *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). FIRE has long maintained that these two responsibilities need not be in tension.

As I am sure each of the members of the Committee would agree, access to higher education is critical—especially in today's economy, where a college degree is so often a requirement for career advancement. Given the high stakes for both the accusers and the accused in campus sexual assault disciplinary hearings, it should be beyond question that neither student's educational opportunities should be cut short unjustly. Just as it is morally wrong and unlawful for a college to sweep allegations of sexual assault under the carpet, it is also inexcusable both ethically and legally to expel an accused student after a hearing that provides inadequate procedural safeguards. As recent news reports have demonstrated all too well, both of these regrettable outcomes occur at campuses across the country with alarming frequency. *See* Attachment B.

Institutions adjudicating guilt or innocence in sexual assault cases must do so in a fair and impartial manner that is reasonably calculated to reach the truth. This should be self-evident. Indeed, in the April 4, 2011, "Dear Colleague" letter issued by the Department of Education's Office for Civil Rights (OCR), the agency acknowledged that "a school's investigation and hearing processes cannot be equitable unless they are impartial."

Disappointingly, however, OCR's own rhetoric and actions have been decidedly one-sided, emphasizing the rights of the complainant while paying insufficient attention to the rights of the accused. For example, OCR has mandated that institutions utilize our judiciary's lowest burden of proof, the "preponderance of the evidence" standard, despite the absence of any of the fundamental procedural safeguards found in the civil courts of law from which that standard comes. Without the basic procedural protections that courts use (like rules of evidence, discovery, trained legal advocates, the right to cross-examine witnesses, and so forth), campus tribunals are making life-altering findings using a low evidentiary threshold that amounts to little more than a hunch that one side is right. This mandate is not just unfair to the accused—it reduces the accuracy and reliability of the findings and compromises the integrity of the system as a whole.

Perhaps predictably, OCR's lopsided focus has had negative consequences for the rights of accused students in sexual assault adjudications conducted in recent years. As the partners of the National Center for Higher Education Risk Management (NCHERM) stated in a May 2014 open letter: "We hate even more that in a lot of these cases, the campus is holding the male accountable in spite of the evidence — or the lack thereof — because they think they are supposed to, and that doing so is what OCR wants." *See* Attachment C. NCHERM's statement was remarkable not only because of the organization's extensive client list—per the group's website, it currently provides legal services to over 65 colleges and universities and consulting services to thousands of clients—but also because Brett Sokolow, NCHERM's founder, President, and Chief Executive Officer, has been an outspoken proponent of federal involvement in campus sexual assault adjudication, describing himself as an "activist" for victims' rights. In other words, OCR's mandates have had such a negative effect on campus justice that even outspoken proponents of those mandates are voicing serious concern.

Critics may have legitimate grievances with the way campus tribunals have often treated accusers. But exchanging institutional disregard for accusers for an institutional disregard for the accused is not an acceptable outcome and does not advance justice. FIRE is hopeful that the Education and Workforce Committee will tackle this important issue in a way that addresses the needs of all students.

## II. Concerns about Institutional Competency

Thus far, a great deal of the discussion about how to best address sexual assaults on college campuses has accepted the premise that university administrators are qualified to serve as fact-finders and adjudicators. But if there is one thing that all sides of this issue agree on, it is this: Few, if any, schools have demonstrated the competence necessary to capably respond to the problem of sexual assault on campus. Too many campus administrators inject their biases into the process, while the rest, despite often trying their best, simply lack the necessary expertise or proper tools. This is the reality of the current system. It is very difficult to craft legislative remedies to the basic problems presented by entrusting the adjudication of allegations of serious criminal misconduct to a campus judicial system that was not intended to handle serious crimes and which will never have the appropriate tools or resources to do so. The current arrangement benefits no one, and its readily apparent failures should lead us all to question the wisdom of doubling down on this broken system.

FIRE is not alone in our assessment that campus judiciaries are ill-equipped to adjudicate sexual assault cases. This concern was expressed eloquently by the Rape, Abuse and Incest National Network (RAINN) in its comment submitted to the White House Task Force:

It would never occur to anyone to leave the adjudication of a murder in the hands of a school's internal judicial process. Why, then, is it not only common, but expected, for them to do so when it comes to sexual assault? We need to get to a point where it seems just as inappropriate to treat rape so lightly.

While we respect the seriousness with which many schools treat such internal processes, and the good intentions and good faith of many who devote their time to participating in such processes, the simple fact is that these internal boards were designed to adjudicate charges like plagiarism, not violent felonies. The crime of rape just does not fit the capabilities of such boards. They often offer the worst of both worlds: they lack protections for the accused while often tormenting victims.

See Attachment D, p. 9.

University of California system President Janet Napolitano recently expressed a similar sentiment in an article published in the *Yale Law & Policy Review*. She cautioned, "the federal government's expectations, especially related to investigations and adjudication, seem better-suited to a law enforcement model rather than the complex, diversely populated community found on a modern American campus."<sup>1</sup> On this point, she is right.

Campus disciplinary boards lack the ability to collect, hold, and interpret forensic evidence. They lack the ability to subpoena witnesses and evidence or even put under oath those who appear voluntarily. The parties typically lack the representation of experienced, qualified

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<sup>1</sup> Janet Napolitano, "Only Yes Means Yes": An Essay on University Policies Regarding Sexual Violence and Sexual Assault, 33 *YALE L. & POL'Y REV.* 387, 398-99 (2015).

legal counsel, and they do not have the right to discovery. These proceedings are not governed by the rules of evidence and often disregard the right to confront adverse witnesses. The fact-finder—often a single investigator—decides whether there was a sexual assault under the low “preponderance of the evidence” standard. Put simply, expecting these tribunals to reach reliable, impartial, and just results is unrealistic.

Training requirements for the campus administrators (and sometimes even students and faculty) handling these cases are unlikely to sufficiently fix the core disjunction between the competencies of institutions of higher education and the grave responsibilities inherent in the adjudication of sexual assault allegations. Sexual assault allegations are often nuanced and complex, which is one of the reasons why they present challenges to even the trained professionals employed by our criminal justice system. As the NCHERM partners observed: “[T]he public and the media need to understand that campus [sexual assault] complaints are not as clear-cut as the survivors at [victims’ advocacy group] Know Your IX would have everyone believe.” *See Attachment C.*

Victims of sexual assault deserve justice. Justice can only be served by competent professionals. Instead of creating a parallel justice system staffed by inexperienced, partial, and unqualified campus administrators to adjudicate campus sexual assault, policymakers should instead take this opportunity to improve and expand the effectiveness and efficiency of our criminal justice system to ensure that it provides an appropriately thorough, prompt, and fair response to allegations of campus sexual assault. Professional law enforcement and courts have the benefit of years of expertise, forensics, and legal tools like subpoenas and sworn testimony that are not available to campus adjudicators. These resources should be brought to bear on campus.

The hurried rush to find the accused guilty described by NCHERM in its open letter was inevitable in the current legal environment, where the federal government has mandated low evidentiary standards, called into doubt accused students’ right to cross-examine their accusers, interchangeably used the terms “victims” and “complainants” in pre-hearing contexts, and actually instructed institutions that in some instances they may take “disciplinary action against the harasser” even “prior to the completion of the Title IX and Title IV investigation/resolution”—in other words, before anyone has actually been found responsible for the offense. The inescapable perception of a top-down federal bias against the accused is solidified by the fact that to the best of FIRE’s knowledge, OCR has yet to take corrective measures against any institution for lack of impartiality against the accused or to intervene on an accused student’s behalf in any of the civil rights lawsuits they have filed, despite numerous examples of colleges punishing accused students with little if any evidence and after using embarrassingly minimal procedural safeguards.

Again, the perception of bias on the part of OCR is having a real effect on the reliability of campus adjudication across the country. After all, when deciding a case under the preponderance of the evidence, even a light thumb on the scales of justice can affect the outcome. One disturbing example comes from Occidental College, where the institution expelled a male student after finding that the female student was incapacitated, despite a 24-minute-long text message conversation showing the complainant taking deliberate steps to sneak away from her friends and into the young man’s dorm room for the express purpose of having sex. In one text she asks him, “do you have a condom,” and then she messaged a friend, “I’mgoingtohave sex now” [sic]. It cannot be a coincidence that this

result arrived on the heels of OCR launching a Title IX investigation into Occidental's handling of sexual assault claims, demonstrating the real harm caused when institutions feel pressured to reach guilty findings. Indeed, FIRE's involvement in this issue was spurred by a case in which an accused college student, Caleb Warner, was found responsible for sexual assault by the University of North Dakota despite evidence that not only did not support his guilt, but that was sufficiently in Warner's favor as to cause local law enforcement to pursue his *accuser* for filing a false police report. *See* Attachment E.

Leaving the investigation and adjudication of sexual assault allegations to law enforcement professionals and our courts of law would reduce or eliminate the involvement of self-interested universities, thus producing a more fundamentally fair process for all involved. Campus adjudicators with real or perceived interests in securing certain judicial outcomes undermine the reliability of the process. Indeed, the importance of disinterested judicial review was emphasized by Senators Gillibrand and McCaskill in their efforts to transfer sexual assault hearings from the jurisdiction of military tribunals, which boast far more protective procedures than campus tribunals, to civilian courts.

Finally, college tribunals are an inadequate forum for addressing serious felonies. If complainants are reluctant to go to law enforcement, that problem must be addressed directly by working with law enforcement. Diverting sexual assault cases from the criminal justice system to campus courts is dangerous. The harshest sanction a university can impose on a rapist is expulsion. Campus courts are unequipped to provide either the necessary process due the accused or the punishment justice demands for the victim and society if the accused is found guilty. We must stop pretending that campus tribunals are adequate alternatives to criminal justice and prioritize referring complainants to law enforcement professionals, so we have the chance to remove dangerous criminals from our communities. We must stop circumventing the criminal justice system. Continuing to do so is dangerous.

### III. Analysis of Pending Legislation

#### A. The Campus Accountability and Safety Act

The Campus Accountability and Safety Act (CASA) would continue to rely on campus judiciaries to reach factual determinations and punish those deemed responsible for committing these heinous crimes. While the bill will not alleviate the risk of unjust findings caused by assigning ill-equipped campus administrators the responsibility of adjudicating these important cases, it does offer some improvements over the status quo. CASA contains some provisions FIRE supports: It requires that institutions enter into agreements with local law enforcement agencies, and prohibits institutions from adjudicating cases against student athletes in special proceedings. Other provisions, however, require amendment.

##### *Neutral Language*

CASA treats the problem of addressing sexual assault on campus as a one-sided issue of supporting "victims," instead of protecting the rights of both complainants and the accused. The bill presumes the guilt of all accused students, referring to accusers as "victims" throughout the legislation, even when referring to them in the pre-adjudication context.

Failure to use neutral language that refers to accusers as “complainants” prior to adjudication signals to institutions that Congress does not value impartiality.

#### *Unequal Assignment of University Resources*

CASA would institutionalize inequality within sexual assault proceedings by providing substantial resources to complainants—for example, a “confidential advisor”—without providing similar resources to the accused. This imbalance is at odds with regulations implementing the reauthorization of the Violence Against Women Act (VAWA), which require colleges to provide “the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice.”<sup>2</sup> Additionally, OCR has interpreted Title IX’s implementing regulations to require that colleges allowing advisors to participate “at any stage of the proceedings ... must do so equally for both parties.”<sup>3</sup> As OCR observes, “[a] balanced and fair process that provides the same opportunities to both parties will lead to sound and supportable decisions.” FIRE supports CASA’s determination to provide resources to help complainants navigate the system, but urges Congress to provide similar resources to the accused.

#### *Trauma-Informed Training for Fact-Finders*

Adding to the imbalance, CASA mandates that university employees responsible for “resolving complaints of reported sex offenses or sexual misconduct policy violations” must receive training on “the effects of trauma, including the neurobiology of trauma.” While trauma-informed training may be appropriate for first responders and those conducting initial interviews, providing that training to campus adjudicators undermines the impartiality of the process. The bill should be amended to make clear that such training is not to be provided to fact-finders, who are supposed to be impartial.

#### *Penalty Provision*

CASA’s penalty provision allows colleges to be fined 1 percent of their operating budgets per violation. While we presume this provision was intended to provide a more realistically enforceable penalty than the current penalty structure under Title IX—which subjects institutions to a loss of all federal funding—this provision potentially *increases* penalties. Federal dollars are only one source of funding for institutions. So, for example, if the Department of Education finds more than 15 violations at an institution that receives 15 percent of its operating budget via federal funds, the potential penalty will be greater than it is under the current system. Indeed, OCR claimed to have found over 40 unique violations at the University of Montana in 2013.<sup>4</sup> The penalty provision must be capped.

<sup>2</sup> Advisor of Choice (§ 668.46(k)(2)(iii) and (iv)), 79 Fed. Reg. 62773 (Oct. 20, 2014).

<sup>3</sup> DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE, <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

<sup>4</sup> Joseph Cohn, *Legislative Rush on Campus Sexual Assault Threatens Student Rights*, THE TORCH (Sept. 29, 2014), <https://www.thefire.org/legislative-rush-campus-sexual-assault-threatens-student-rights/>.

### **B. Safe Campus Act and Fair Campus Act**

Introduced in July, the Safe Campus Act and the Fair Campus Act offer alternative approaches to combating campus sexual assault. Unlike CASA, both bills include meaningful due process protections. While substantially similar, the bills differ in one key way: Under the Safe Campus Act, an institution is precluded from conducting disciplinary hearings regarding allegations of sexual assault unless the complainant reports the allegation to law enforcement. The Fair Campus Act does not include this provision.

Both bills provide accusing and accused students with the right to hire lawyers to actively represent them in the campus hearings and the right to examine witnesses, and both bills require institutions to make inculpatory and exculpatory evidence available to all parties—a requirement that is shockingly absent from many campus disciplinary procedures. The bills reduce conflicts of interest by prohibiting individuals from playing multiple roles in the investigatory and adjudicatory process—preventing, for example, an investigator from serving as an adjudicator. If campuses are to continue to adjudicate sexual assaults, these provisions are obvious and necessary improvements that FIRE supports.

Both bills provide a safe harbor to students who either report or are witnesses to allegations of sexual assault made in good faith, so that they could not be disciplined by their institution for non-violent violations of the student code discovered as a result of investigations into the allegations. This provision will help students come forward with information, to everyone's benefit.

In addition to these important provisions, both bills would repeal the Department of Education's Office for Civil Rights' (OCR) misguided and unlawfully imposed mandate to colleges to use the preponderance of the evidence standard. Doing so would return the decision as to which standard of proof to employ in sexual misconduct hearings to individual states, campus systems, or individual campuses, many of which previously used higher, more appropriate standards such as that of "clear and convincing evidence."

The Safe Campus Act allows the complainant to make the decision as to whether sexual assault allegations should be reported to law enforcement. (FIRE's preference is to require all allegations to be reported.) To encourage more complainants to report allegations to the proper authorities, the bill prohibits institutions from taking action on the complaints unless they choose to report the allegation to law enforcement.

FIRE agrees with the bill's sponsors that punitive interim measures should be waived if a complainant does not report the accusation to law enforcement for investigation. FIRE does recommend, however, that non-punitive interim measures and accommodations be made available regardless of the student's decision to report. While colleges have unsurprisingly proved incapable of competently determining the truth or falsity of felony allegations, they are well-equipped to secure counseling for alleged victims, provide academic and housing accommodations, secure necessary medical attention, and provide general guidance for students who navigate the criminal justice system. Institutions should perform those functions regardless of a complainant's decision to report the incident.

#### IV. Recommendations

The current approach to campus sexual assault adjudication has failed. Legislation may not be able to bridge the vast competency gap between the capabilities of educational institutions and courts coordinating with law enforcement, but it can prioritize linking complainants with the proper authorities and medical professionals; help reduce bias; provide ample resources for education, prevention efforts and counseling services; set forth a framework for providing students with housing and academic accommodations; give institutions the tools to protect their campuses on an interim basis while the wheels of justice turn; and provide all affected parties with meaningful rights that will help them protect their own interests.

If Congress determines that campus tribunals must continue adjudicating these cases, there are steps that can be taken to improve their effectiveness and fairness. First and foremost, our public policy should encourage reporting allegations to law enforcement authorities and give them the space to conduct their professional investigations without interference.

The government should drop its insistence that institutions use the preponderance of the evidence standard. The legal argument that the preponderance standard is the only acceptable standard under Title IX is incorrect, as FIRE has catalogued in our prior correspondences with the Office for Civil Rights. More importantly, the use of this low standard, particularly when decoupled from meaningful due process protections, is unjust. Instead, the government should be encouraging institutions to use the “clear and convincing” standard of evidence, which requires more than just a “50%-plus-a-feather” level of confidence that the evidence supports one side over the other, but less certainty than the criminal courts’ “beyond a reasonable doubt” standard. The government should also encourage institutions that continue to use the preponderance of the evidence standard to add additional due process protections—for example, to provide accused students with a meaningful opportunity for cross-examination in cases where credibility is an issue.

Congress may also improve the reliability and fairness of campus disciplinary hearings by requiring institutions to allow student complainants and accused students to have legal representation actively participate in those proceedings. Typically, the university represents the complainant’s interests by bringing and prosecuting the charges against the accused party. Universities are free to employ lawyers to conduct this function, but this right is typically not extended to student respondents. Notably, the recent passage of the Violence Against Women Reauthorization Act of 2013 included a provision that “the accuser and the accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice.”<sup>5</sup> The Department of Education has (correctly) interpreted this to include the right to have a lawyer present.<sup>6</sup> But for this measure to truly make a difference, Congress must make clear

<sup>5</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

<sup>6</sup> Violence Against Women Act, 79 Fed. Reg. 62,751 (Oct. 20, 2014).

that the advisor may actively participate in the process. Right to counsel legislation making this change passed with overwhelming bipartisan support in North Carolina and North Dakota. *See* Attachments F and G. Allowing both students to have their own counsel actively participate in the process will serve as an important check to ensure that a college proceeds in a just manner.

Congress should also note that statements made by students during on-campus proceedings or in meetings with campus officials are admissible against them in criminal court. By participating without a lawyer, accused students have essentially waived their Fifth Amendment rights. Accused students lucky enough even to recognize this problem are still forced to choose between defending themselves on campus or defending themselves in criminal courts. An example of this dilemma is the case of Ben Casper, a former student at The College of William & Mary, who on the advice of his criminal defense lawyer did not participate in his campus disciplinary proceeding, instead defending himself in his criminal trial. Ben was found not guilty of all the charges against him at trial, but has been refused the opportunity to return to William & Mary.

Further, there are disturbing signs that university administrators are actively exploiting this issue in order to undermine the Fifth Amendment. In July, Susan Riseling, the chief of police and associate vice chancellor at the University of Wisconsin–Madison, was quoted bragging to the International Association of College Law Enforcement Administrators that she was able to circumvent due process protections and secure a criminal conviction of a student by using the statements he made during the campus procedures against him in his criminal trial. Speaking candidly, she told her audience, “It’s Title IX, not Miranda. Use what you can.” *See* Attachment H. Requiring institutions to allow legal advocacy in the campus tribunal will go a long way towards fixing this problem.

Participation of legal counsel will also help the process itself; the example of criminal and civil courts amply demonstrates that hearings proceed much more smoothly when both sides are represented by counsel than when *pro se* litigants are forced to navigate a process with which they are unfamiliar. As the authors of the Sixth Amendment recognized, hearings with the assistance of legal professionals are far more likely to lead to just results than those without.

Congress could also improve campus procedures by prohibiting institutions from allowing individuals to perform multiple roles during the adjudicatory process. Campus advocates should not serve as investigators. Investigators should not serve as adjudicators, and adjudicators should not hear appeals. Preventing the commingling of these responsibilities is an important check that reduces the risk of one person’s bias permeating the entire process. The Safe Campus Act and the Fair Campus Act include provisions to this effect.

Another step Congress may take to ensure that campus tribunals are more effective and fair is to require institutions to include sexual contact with an incapacitated person in their definitions of sexual assault and rape, and to provide an appropriately precise definition of incapacitation. “Incapacitation” is qualitatively different from mere “intoxication.” This is a distinction with a real difference. If one is “incapacitated,” one has moved far beyond mere intoxication; indeed, one can no longer effectively function and thus cannot consent. Courts have recognized that simple intoxication does not necessarily equal incapacitation, and

therefore does not necessarily foreclose consent.<sup>7</sup> College policies must recognize this distinction, as well, perhaps by mirroring state definitions of incapacitation.

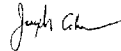
#### V. Conclusion

Sexual assault is one of the most heinous crimes a person can commit. Those found guilty should be punished to the fullest extent allowed by law. But precisely because sexual assault is such a serious crime, ensuring that each case is referred to law enforcement and providing those accused with due process is absolutely vital. As FIRE President Greg Lukianoff has observed: “Due process is more than a system for protecting the rights of the accused; it’s a set of procedures intended to ensure that findings of guilt or innocence are accurate, fair, and reliable.”<sup>8</sup>

FIRE is under no illusion that there is a simple solution to the problem of sexual assault on campus. But by lowering the bar for finding guilt, eliminating precious due process protections, and entrusting unqualified campus employees and students to safeguard the interests of all involved, we are creating a system that is impossible for colleges to administer, and one that will be even less fair, reliable, and accurate than before. Congress can help reverse this trend by taking all students’ interests into account. To accomplish that, Congress should include the best aspects of each pending bill in a comprehensive, balanced bill.

Thank you for addressing this important issue and for considering FIRE’s input. We are deeply appreciative of this opportunity to share our perspective and offer our assistance to you as you move forward. Please do not hesitate to contact us if FIRE may be of further assistance.

Respectfully submitted,



Joseph Cohn  
Legislative & Policy Director  
Foundation for Individual Rights in Education

<sup>7</sup> See, e.g., *Commw. v. Leblanc*, 900 NE.2d 127, 133 (Mass. App. Ct. 2009).

<sup>8</sup> FIRE RESPONDS TO WHITE HOUSE TASK FORCE’S FIRST REPORT ON CAMPUS SEXUAL ASSAULT, Apr. 29, 2014, <https://www.thefire.org/fire-responds-to-white-house-task-forces-first-report-on-campus-sexual-assault/>.

## ATTACHMENT A



February 28, 2014

White House Task Force to Protect Students from Sexual Assault  
 VIA email to [OVW.SATaskForce@usdoj.gov](mailto:OVW.SATaskForce@usdoj.gov)

Dear White House Task Force to Protect Students from Sexual Assault:

The Foundation for Individual Rights in Education (FIRE; [thefire.org](http://thefire.org)) is a nonpartisan, nonprofit organization dedicated to defending core constitutional rights on our nation's university campuses. These rights include freedom of speech, freedom of assembly, legal equality, due process, religious liberty, and sanctity of conscience—the essential qualities of individual liberty and dignity. Every day, FIRE receives requests for assistance from students and professors who have found themselves victims of administrative censorship or unjust punishments.

We thank you for soliciting public input on how the federal government can best assist institutions of higher education in meeting their obligations under Title IX and the Jeanne Clery Act and for allowing us the opportunity to supplement the spoken comments we provided on February 19, 2014.

One of the core constitutional rights that FIRE defends is due process. There is no doubt that universities are both morally and legally obligated to respond to known instances of sexual assault in a manner reasonably calculated to prevent its recurrence. Public universities are also bound by the Constitution to provide meaningful due process to accused students. *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). These obligations need not be in tension.

Today, access to higher education is critical for Americans. Indeed, the White House website calls it “a prerequisite for the growing jobs of the new economy.” The White House, *Higher Education*, available at <http://www.whitehouse.gov/issues/education/higher-education> (last visited Feb. 28, 2014). The stakes are therefore extremely high for both the student complainant and the accused student in campus disciplinary proceedings, and it is essential that neither student's ability to receive an education is curtailed unjustly. When a university dismisses an accusation of a sexual assault without adequate investigation, it has both broken the law and failed to fulfill its moral duty. Recent headlines indicate that far too many schools have taken this path. Similarly, when a college expels an accused student after a hearing that

includes few, if any, meaningful procedural safeguards, it too has failed to fulfill its legal and moral obligations. Far too many schools have taken this path as well.

When a student is suspended or expelled from college without due process protections, the consequences can be profound. In many of those instances, expulsions—particularly for one of society’s most heinous crimes—have the effect of ending educations and permanently altering career prospects. See attachment A.

When an expulsion follows a hearing that includes meaningful due process, there is no problem; justice has been served. But an objective look at the disciplinary procedures maintained by colleges nationwide demonstrates that most institutions fall woefully short of that standard. See attachment B. Sexual assault hearings are complex adjudications of allegations of behavior that constitutes a felony, and the campus judiciary is simply ill-equipped to handle these matters. Without access to the resources, technology, and experience that law enforcement and criminal courts possess, institutions are being asked to determine who is guilty and who is not in these very challenging cases. If there is one thing that people on all sides of this issue agree on, it is this: Few if any schools are capably responding to the problem of sexual assault on campus. Even the best-intentioned campus administrators, of which there are certainly many, simply lack the necessary expertise.

While the law properly forbids institutions from merely referring these cases to law enforcement and washing their hands of them, institutions can and should do many things that stop short of determining innocence or guilt, but which will still go a long way towards ensuring that campuses are safe. Regardless of whether an accusation is later proven true or false, a college can advise students about where to turn to ensure that evidence is preserved. It can help them report accusations properly to law enforcement. It can provide counseling services. It can separate students by changing course schedules and dorm assignments. All of these options, and many more, help ensure that the campus remains a safe place for all students to learn without leaving ultimate decisions of guilt or innocence to campus tribunals, which have proven to be inadequate, ill-prepared forums for adjudicating these cases.

Unfortunately, the federal government, and the Department of Education’s Office for Civil Rights (OCR) in particular, has placed the emphasis on advancing the rights of the complainant, while it has paid insufficient attention to the rights of the accused. OCR has demanded that institutions utilize the judiciary’s lowest burden of proof, the “preponderance of the evidence” standard. So long as campus tribunals have few, if any, of the fundamental procedural safeguards found in civil courts, using this low standard diminishes the reliability of the outcomes of these hearings. Instead of utilizing a low evidentiary standard that diminishes the accuracy of the on-campus findings, colleges should take meaningful measures to ensure that their tribunals are more fair and more reliable for all parties.

Fair, impartial tribunals should be a self-evident necessity. In OCR’s April 4, 2011 “Dear

Colleague” letter, the agency acknowledged that “a school’s investigation and hearing processes cannot be equitable unless they are impartial.” While FIRE wholeheartedly agrees with this sentiment, we have yet to see a single instance in which the Department has taken action against an institution for lack of impartiality against the accused. This is true despite numerous examples in which colleges punished accused students with scant if any evidence, using embarrassingly minimal procedural safeguards. We have even seen repeated instances in which colleges expel students despite the fact that juries have found those students not guilty in real criminal trials covering the same accusations. In some cases, the evidence not only was insufficient to support guilty verdicts under criminal law evidentiary standards but also dispositively proved the innocence of the accused. Caleb Warner’s case from the University of North Dakota is illustrative. See attachment C. We point this case out not to argue that false accusations are the norm, but rather to emphasize that justice requires that individualized determinations are based upon the known facts of each case, not upon statistical assumptions.

In FIRE’s view, colleges and universities can take a number of steps to improve access to campus tribunals and increase their reliability and fundamental fairness. To start, universities should ensure that all students know where to register their complaints. Universities should publicize this information clearly, and make sure that all campus personnel are familiar with this information as well.

As for ensuring that campus tribunals operate fairly, it is first necessary to recognize that the *status quo* is unacceptable. Again, we emphasize that FIRE and others are growing increasingly skeptical of the campus judiciary’s ability to fairly analyze and adjudicate cases of serious felonies like sexual assault, but we offer the following suggestions which we believe will make the process fairer than it is today.

First and foremost, FIRE believes that OCR should drop its mandate that these tribunals decide cases under the preponderance of the evidence standard. The legal argument that the preponderance standard is the only acceptable standard under Title IX is incorrect, as FIRE has catalogued in our prior correspondences with the Office for Civil Rights. See attachments D, E, and F. Instead, OCR should encourage institutions to use the “clear and convincing” standard of evidence, which requires more than just a “50%-plus-a-feather” level of confidence that the evidence supports one side over the other. OCR should also encourage institutions using the preponderance standard to set forth substantive protections for the accused to balance out the low evidentiary threshold. For example, institutions should ensure that there is some mechanism for the accused to cross-examine his or her accuser.

One of the most important things that the federal government can do to improve the reliability and fairness of campus disciplinary hearings is to require schools to allow student complainants and accused students to have legal representation actively participate in those proceedings. Typically, the university represents the complainant’s interests by bringing and

prosecuting the charges against the accused party. Universities are free to employ lawyers to conduct this function. Providing student complainants with a matching right to have their own counsel actively participate in the process will serve as an important check to ensure that a college proceeds in a just manner rather than giving into the temptation to act in a manner that protects its own interest in avoiding liability.

It is also important to keep in mind that anything a student says during an on-campus proceeding is admissible against him or her in criminal court. Without a lawyer, accused students are effectively waiving their Fifth Amendment rights. Some are forced to choose between defending themselves on campus or defending themselves in criminal courts. One such example is Ben Casper, a former student at The College of William and Mary, who on the advice of his criminal defense lawyer did not participate in his campus disciplinary proceeding, instead defending himself in his criminal trial. Ben was found not guilty of all the charges against him in court, but has been refused the opportunity to return to school. Allowing legal advocacy in the campus tribunal will go a long way towards solving this problem. At the same time, it will likely help the process itself; the example of criminal and civil courts amply demonstrates that hearings proceed much more smoothly when both sides are represented by counsel than when *pro se* litigants are forced to navigate a process with which they are unfamiliar. As the Framers of the Sixth Amendment recognized, hearings with the assistance of legal professionals are far more likely to lead to just results than those without.

Throughout the listening sessions, participants offered two suggestions in particular that FIRE would like to address. One suggestion that was offered repeatedly was that institutions should be required to subject their students to mandatory surveys to gauge campus climate and obtain more detailed information about sexual assault on campus. While FIRE appreciates this desire to have better information, we nevertheless believe there are serious civil liberties implications to compelling students—or anyone for that matter—to answer sensitive questions about their sexual activities. This information is very personal, and compelling individuals to share this information with the government is deeply troubling. Surveys, if they are conducted, should be voluntary, and appropriate measures should be taken to ensure that the anonymity of the participants is protected.

Another suggestion offered during the listening sessions was that the government should use the “affirmative consent” standard when collecting data about sexual assault and require institutions to use that standard in their disciplinary hearings. The affirmative consent standard is a confusing and legally unworkable standard for consent to sexual activity.

Affirmative consent posits that sexual activity is sexual assault unless the non-initiating party’s consent is “expressed either by words or clear, unambiguous actions.” Should proving “affirmative consent” become law, there will be no practical, fair, or consistent way for colleges to ensure that these newly mandated prerequisites for sexual intercourse are

followed. It is impracticable for the government to require students to obtain affirmative consent at each stage of a physical encounter and to later prove that attainment in a campus hearing. Under this mandate, a student could be found guilty of sexual assault and deemed a rapist simply by being unable to prove she or he obtained explicit verbal consent to every sexual activity throughout a sexual encounter. In reality, requiring students prove they obtained affirmative consent would render a great deal of legal sexual activity “sexual assault” and imperil the futures of all students across the country.

We note that the concept of affirmative consent was first brought to national attention when it was adopted by Ohio’s historic Antioch College in the early 1990s. When news of the college’s policy became public in 1993, the practical difficulty of adhering to the policy prompted national ridicule so widespread that it was lampooned on *Saturday Night Live*. Indeed, the fallout from the policy’s adoption has been cited as a factor in the college’s decline and eventual closing in 2007. See attachment G. It has since reopened. The awkwardness of enforcing “affirmative consent” rules upon the reality of human sexual behavior has continued to be a popular subject for comedy by television shows such as *Chappelle’s Show* and *New Girl*. The humor found in the profound disconnect between the policy’s bureaucratic requirements for sexual interaction and human sexuality as a lived and varied experience underscores the serious difficulty that requiring the standard would present to campus administrators across the nation.

Thank you very much for addressing this important issue and for considering FIRE’s input. We are deeply appreciative of this opportunity to share our perspective, and offer our assistance to you as you move forward. Please do not hesitate to contact us if we can be of any assistance.

Respectfully submitted,



Joseph Cohn  
Legislative and Policy Director

## ATTACHMENT B

# The New York Times

## The Best Way to Address Campus Rape

Judith Shulevitz – February 7<sup>th</sup>, 2015

THE campus rape debate took another hairpin turn last week when The Daily Beast published an interview with Paul Nungesser, the Columbia student accused of raping a fellow student, Emma Sulkowicz. She has been carrying a mattress around the campus to raise awareness about sexual assault and to protest the school's failure to expel Mr. Nungesser, who was cleared by a campus tribunal.

The article raised questions about her story; among other things, it included screen shots from Mr. Nungesser's Facebook account showing that he and Ms. Sulkowicz had traded mutually affectionate messages for weeks after the incident in question.

In response, the Columbia Daily Spectator published two columns wondering whether the paper had been too quick to assume Mr. Nungesser's guilt. Ms. Sulkowicz's supporters and some bloggers denounced The Daily Beast for conducting a trial by media and for posting the Facebook pages, which they said added nothing to the story unless you believed that a rape survivor who didn't behave like the perfect victim had to be a liar.

But the media has reason to retry the case. Ms. Sulkowicz herself sought out the media when Columbia exonerated Mr. Nungesser. And the media made Ms. Sulkowicz so well known as a rape survivor that Senator Kirsten E. Gillibrand, Democrat of New York, invited her to the State of the Union address and publicly declared that she had received "no justice." Very few people, and almost no one in the media, thought to question that assertion, because everyone knows, just knows, that you can't trust a campus sexual assault proceeding.

What explains the nearly universal lack of confidence in these proceedings? Universities share some of the blame, but there's another culprit too: the United States government. People often wonder why college administrators try to adjudicate these fiendishly difficult cases, rather than putting them in the hands of the criminal justice system.

The reason is that the Department of Education has very forcefully told schools to handle sexual grievances themselves and given them very detailed instructions about how to do so. A report last year from a White House task force on campus sexual assault underscored the importance to a university of following that advice. Even though the D.O.E.'s instructions are presented as recommendations rather than law, its Office for Civil Rights can put any school that fails to follow them on the list of colleges under investigation and even take away its federal funding.

There's no doubt that on many occasions colleges have not treated sexual-assault accusations as seriously as they should have. Nor did they do enough to ensure that women felt completely safe on campus. But in the past half-decade, the civil rights office has tried so hard to correct that problem that it is now forcing schools to go too far in the other direction, which has made campus procedures seem even less credible. Schools are being told to disregard what most Americans think of as the basic civil rights of a person accused of a heinous act.

Among other things, schools have to determine guilt on the basis of a "preponderance of" rather than "clear and convincing" evidence — that is, on a 51 percent likelihood that the man did it, rather than a 75 percent one. (In these cases, the accused is almost always a man, although the accuser is by no means always a woman.) Neither party is allowed to cross-examine the other, lest direct questioning re-traumatize a victim. Schools must resolve cases swiftly — the original requirement was 60 days, though the latest guidelines leave out the number and simply stress the need for a prompt resolution — even if a criminal investigation is going forward at a slower pace.

That puts a student who wants to defend himself at risk of saying things that could later be used against him in court — and at many schools, he's not even allowed to let a lawyer speak for him. At least 30 male students, some of whom were suspended or expelled for sexual misconduct, have filed suits against their universities, claiming that the process was unfair.

What should universities do to convince the world that they're fit to deal with campus rape? First, they should band together and demand that the government rethink its guidelines, especially those that flout the key tenets of due process. Second, they should ask the Office for Civil Rights to clarify its notion of sexual misconduct, now left to each school to define. Is it rape if a man fails to get affirmative consent at every stage of a sexual interaction, or only if he ignores a spoken objection? If a man and a woman are equally drunk, should he be found guilty of assaulting her because she was too intoxicated to agree to sex, even though he himself may have been too drunk to know that? (Right now, at most schools, he would be considered guilty.)

Third, universities should insist that determinations of guilt or innocence rely on a "reasonable-person test," according to which the accused is only culpable if a reasonable person would have considered his actions to be wrong. Without that standard, his fate may rest on her subjective judgment — if she feels that he imposed unwanted sexual contact on her, no matter what he actually did, then he can be found to have harassed or raped her. (Harvard's controversial new policy leaves out the reasonable-person standard, which is partly why 28 of its law professors have publicly objected to it.)

The fourth step, however, may be the most important. Though schools have the right to uphold their own standards of conduct, the government is currently scaring them into creating big, expensive bureaucracies and designing unduly cumbersome policies. Meanwhile, there are many more 18- to 25-year-old rape victims outside the walls of colleges than inside them. The smarter and more public-spirited thing for schools to do would be to divert at least some of their time and energy to forming partnerships with local law enforcement agencies.

It is widely believed that the police are insensitive to rape victims. Universities, on the whole, have a great deal of clout in their communities; they also possess considerable intellectual resources. They could be helping policemen and prosecutors do a better job with sexual violence cases instead of squandering money and good will on their own all-too-easily second-guessed shadow justice systems.

## ATTACHMENT C



**An Open Letter to Higher Education about Sexual Violence  
from Brett A. Sokolow, Esq. and The NCHERM Group Partners**

**May 27th, 2014**

Our goal is to help higher education embrace and empower gender equity through fair processes, which we all should share as a goal. Who we are and what we do is important to the message of this letter, because of the unique vantage point and perspective we have. We run The NCHERM Group, the largest higher education-specific law practice in the country, doing the legal work of more than 50 campuses. We consult with more than 300 campuses each year, in addition to those we represent as attorneys. We've had more than 3,000 higher education clients since 2000. We have a special expertise in Title IX law, and our law firm frequently represents campuses being investigated by the Department of Education's Office for Civil Rights (OCR), though we prefer to try to keep them from being investigated in the first place.

We are the founders of ATIXA, a membership association of more than 1,400 campus Title IX coordinators and investigators who both look to OCR for guidance and occasionally curse Washington for their workload. We have victim's advocate training, and our experience suggests victims tell the truth. We are all investigators who have done countless campus sexual misconduct investigations, which require a very different approach than victim advocacy. We are expert witnesses and litigation strategists in Title IX cases, both for and against campuses and schools. We represent both victims and accused students in campus hearings, though obviously never at the same time. We don't help rapists to get away with it. We wish campus attorneys and conduct officers would stop treating attorneys representing students in the conduct process as if it is an adversarial role. After all, we share the goal of protecting student rights, and assuring the equal dignity of all students.

It upsets some individuals in higher education that we are not always on the side of colleges in these cases, but that would just make us hired guns for money, not experts. Sometimes, campuses do this wrong; sometimes, they do it right. Our firm's record of success in cases suggests we rarely lose, and that is because we choose clients based on principle, and we choose based on who we believe has the right legal argument. We have trained thousands of campus civil-rights investigators and Title IX coordinators. As change-agents, we understand that we can be polarizing. We don't have just one job or

one role. We won't pick a side. Our loyalty is only to civil rights equity, and we see it from a unique 360° vantage point. This is what we see...

Colleges and universities struggled to fully embrace gender equity until April 4<sup>th</sup>, 2011. When OCR issued its April 4, 2011 Dear Colleague Letter (DCL), it changed higher education forever. For whatever reason, that day was simply a tipping point for the field. The broad strokes of that letter painted a clear picture, and sincere and earnest commitment followed. The details could have been better-defined, but credit for genuine change needs to be given to OCR and the White House. We have never seen higher education move, at once and in concert, in the same direction on a single issue with such dramatic fervor. Students sensed it, too, and reporting has dramatically increased as a result on almost every campus that has made serious changes to policies and procedures. On many, reporting has doubled. This is not a doubling of incidents, but a doubling of the willingness of victims to come forward. Thank you for trusting your campuses with your stories.

But, the pace of change is still too slow for groups like Know Your IX and Ed Act Now, as well as the President of the United States, and perhaps even for the OCR. It has been three years since the DCL was published, and some campuses still have not fully realized the changes that are needed. In the midst of the slow but steady progress campuses have been making, Congress compounded the compliance challenge with passage of the Campus SaVE provisions in the VAWA reauthorization in March of 2013. OCR has kept the pressure on by investigating an unprecedented number of campus complaints -- ninety at last count -- many catalyzed by the grassroots, decentralized, social network-based activism of groups like Know Your IX.

Ed Act Now wants OCR to put some teeth and transparency into its enforcement. OCR wants to transform campuses rather than punish them, and feels the heat of imperatives from the Vice President, the President and Congress, as well as push-back from higher education that they've gone too fast, and from organizations like the Foundation for Individual Rights in Education (FIRE) that they have gone too far. Campuses complain that OCR is creating change by slapping one campus at a time, rather than providing wider and more frequent guidance. Campuses are confused by varying messages from different OCR offices, and from the inconsistent enforcement actions being undertaken and publicized. It seems that OCR takes criticism from every side. So does higher education, and we hope OCR can see that, too.

Victims go to the media, file OCR complaints, and Title IX lawsuits. They've figured out they can put more teeth in their grievances by filing class-action complaints to the Departments of Education and Justice, complaining of Title IX, Title IV and Clery Act violations. Two historic fines for Clery Act violations are expected to be leveled any day now. Accused perpetrators have revived the "erroneous outcome" claim and are suing campuses and victims in increasing numbers, too, and using Title IX to do it. At least ten such suits are winding through the federal courts right now. Campuses flooded OCR

with 1,400 questions last year when it announced it was going to provide an FAQ on the DCL. OCR released it just last month as a 53-page document adding even more clarification to Title IX, and more work for colleges. And, as if that wasn't complicating enough, impact litigator Wendy Murphy recently filed a federal lawsuit to enjoin enforcement of the Campus SaVE Act as unconstitutional, and is telling campus presidents that the SaVE Act has compromised Title IX's efficacy, a claim that is widely debated in campus legal circles.

The Huffington Post now maintains a dedicated sub-site focused on campus sexual violence, *Breaking the Silence*, and rarely lacks for content. Less savvy media outlets still attack campuses for meddling in what is otherwise criminal behavior, and wonder why campuses are involved in rape cases at all? Many administrators may wonder similarly, but they understand what the public largely does not: campuses are mandated by Title IX to resolve and remedy all forms of sex and gender discrimination, which includes all acts of campus sexual violence. They also understand that the courts are virtually useless at prosecuting known-offender assaults on campuses where alcohol is often the key factor and recollections are anything but clear. In short, campuses have no choice, and consigning campus victims to the criminal justice process is often consigning them to no remedy at all. Campuses regularly address other "crimes" that students commit through administrative discipline processes. What would it look like if campuses addressed assault, drug dealing, weapons, arson, theft, etc., but not sexual assault? They would be accused of dodging the issue.

Caught in the middle of all this is the campus Title IX Coordinator (TIXC) who receives a complaint from a victim who is in pain. The TIXC pursues the complaint with diligent investigation within the requisite +/- 60 days, and then calls us in puzzlement over why they have now found text messages from the complainant both before and after the incident, describing it as consensual. It's easy for media outlets to paint uncaring campuses as the bad guys over and over again, but reality is often far more complex than that. Worse, FERPA – the federal student privacy law – leaves colleges unable to explain and defend the backstory to the cases they process.

Our generation and generations before us fought from our very cores for the right of victims to be believed, to be treated with respect, and to receive acknowledgment of their basic dignity from seemingly callous educational institutions that championed male privilege by merely slapping rapists on the wrists, if they punished them at all. We've been instrumental in seeing hundreds, if not thousands, of victims vindicated through campus resolution processes, which is why we're so pained that while the last twenty years has brought transformation, we've now arrived at the destination only to find that today's students have wholly redefined sexual experience – as every generation does – without reference to the rules we wrote. How can we demand respect for a generation that at times seems not demand it from themselves, or at least demands it on very different terms than we did? To illustrate what we mean, we can use just some of the

recent cases where our firm was asked to assist. Please note this **trigger warning** for graphic and rape-related content in what follows:

- A female student interviewed recently during an investigation had spread rumors by social media that she had been raped by a male student. When the rumors got back to the male student, he approached her about it, and she offered him a lengthy apology, and then put it in writing. We had to investigate nevertheless, and she told us that they'd had a drunken hook-up that she consented to. She was fine with what happened. We asked her why she called it a rape then, and she said, "you know, because we were drunk. It wasn't rape, it was just rapey rape." We asked her if she was aware of what spreading such an accusation might do to the young man's reputation, and her response was "everyone knows it wasn't really a rape, we just call it that when we're drunk or high." By the way, whomever popularized the term "rapey" deserves a special place in purgatory. For more on the drunk sex issue, click [here](#).
- A female student alleged a campus sexual assault based on non-consensual oral intercourse. Her texts both before and after the incident with the alleged perpetrator state that she enjoys swallowing and "dirty boys who cum in her mouth," all in reference to her actions with him. In her complaint that the oral sex was non-consensual, she informed the campus that she was appalled that he did not wear a condom. He insists it was consensual. We don't know that we'll ever know what happened, but we do know what can and can't be proven.
- A female student was caught by her boyfriend while cheating on him with another male student. She then filed a complaint that she had been assaulted by the male student with whom she had been caught cheating. The campus investigated, and the accused student produced a text message thread from the morning after the alleged assault. It read:
  - Him: How do I compare with your boyfriend?
  - Her: You were great
  - Him: So you got off?
  - Her: Yes, especially when I was on top
  - Him: We should do it again, soon
  - Her: Hehe
- A female student claimed multiple instances of sexual aggression, assault and coercion by her boyfriend over more than a year, but after making the complaint, she could not recall or provide ANY specifics of each instance in terms of location, time, or salient details. His corroborative evidence showed cooperation and even initiation by the complainant.
- A female student claimed a male student performed oral sex on her without her permission on October 3<sup>rd</sup>. He did so again on October 11<sup>th</sup>. On October 13<sup>th</sup>, they had consensual sexual intercourse. On November 2<sup>nd</sup>, he again performed oral sex on her without her consent. She complained about the three non-consensual acts, but not the consensual intercourse. The campus processed this

complaint to a fair outcome based on the October 13<sup>th</sup> violation, but it demonstrates how little black and white exists in some of these cases.

- A male student performed demeaning, degrading and abusive sexual acts on a female non-student. They engaged in BDSM, and he ignored her protests throughout the entire sexual episode, despite her screaming in obvious pain and trying to get away from him. She filed a grievance with the campus, and we soon discovered instant messages in which she consented just before the incident to exactly these acts, and agreed to forgo the use of a “safe word” common in BDSM relationships.
- A female student accused a male student of sexual assault. When her complaint of sexual assault was heard by a campus panel, there was literally no evidence to support her complaint. He was found not responsible and decided not to press a complaint against her for a false allegation out of sensitivity to her serious mental health issues. Then, she went around campus telling anyone and everyone that he had raped her. The male student then filed a complaint against the female student for harassment. The female student then filed a complaint with the college for processing his complaint as an act of retaliation against her.
- In another recent case, a long-term relationship between two students involved many consensual sexual acts. The couple broke up. The male student started dating another student on campus, at which point the former girlfriend filed a complaint that there were non-consensual acts amongst many prior and subsequent consensual acts that they engaged in. Perhaps, but the timing is suspicious, and there is no evidence to suggest any concern about the behaviors during the time they were dating. Again, there is often a chasm between what is alleged and what evidence is able to prove.

We could go on and on with a litany of these complicated and conflicting cases. We hate that some of them provoke tired old victim-blaming tropes, such as the woman scorned and the cover-up of cheating. We hate even more that in a lot of these cases, the campus is holding the male accountable in spite of the evidence – or the lack thereof – because they think they are supposed to, and that doing so is what OCR wants. If you work on a college campus, we don’t have to point out the complexity of the complaints we receive. But, the public and the media need to understand that campus complaints are not as clear-cut as the survivors at Know Your IX would have everyone believe.

Sexual assault is rampant on campuses, no matter what study you read. Debating prevalence is futile, because one victim is one too many. But, not every complaint can be resolved, and not every allegation can be proved. We don’t see victims making many false complaints<sup>1</sup>, but just as the OCR-mandated preponderance standard (what is more likely than not?) should be making it easier to determine what violates a policy, Millennial sexual mores are clouding the evidence. We see complainants who genuinely believe they have been assaulted, despite overwhelming proof that it did not happen.

<sup>1</sup> A malicious or false complaint made by someone knowing it to be untrue.

We fear for the mental health issues impacting many students, but in particular for those whose reality contact issues manifest in sexual situations they can't handle and campuses can't remedy. We hate even more that another victim-blaming trope – victim mental health – continues to have legs, but how do you not question the reality contact where case-after-case involves sincere victims who believe something has happened to them that evidence shows absolutely did not? How do campus and community mental health resources help someone who is suffering from real trauma resulting from an unreal episode?

It's futile, we know, to wish that this generation of students would stop inviting ambiguity into so many of their sexual interactions<sup>2</sup>. But, we can tell them that the great majority of administrators we work with daily encourage reporting, and will receive their reports with open-mindedness, compassion and empathy. We know it may be a vain hope, but students, we really wish you would help us help you. We wish you would say yes when you mean yes, no when you mean no, and text in a way that reinforces what you said or did, rather than contradicts the allegations you have made. In a remarkable shift, the field is now finally sympathetic to victims, and societal victim-blaming tendencies are ebbing, but we fear the tide will shift again, against believing victims. None of our hopes above takes away from the fact the college messaging also needs to tell potential perpetrators to get consent, to stop raping, to avoid sex with those who have been drinking, and to intervene in potentially harmful situations, not as patriarchal protectors, but as empathic beings in inter-dependent communities.

We fear that other activists and the victim advocacy community will see this letter as anti-victim. Instead, we hope that the field will reject a victim-blaming analysis in favor of deeper exploration of the challenges we all are facing. Any person has the right to their autonomy, and the self-determination to claim it if they have been victimized. We cannot give that to them, and we cannot take it away. But, a victim's self-labeling does not make the person they are accusing a perpetrator. Only a campus resolution process, conducted under equitable rules in compliance with Title IX, can determine that an accused student violated campus policy (which doesn't make them a rapist, in a criminal sense). And, every campus owes services, resources and supports to every victim, regardless of whether a campus process is able to uphold their complaint or not.

The President of the United States wants us to solve the campus sexual assault problem. So we have some thoughts about how we all can be more effective stakeholders in the solution. Here's a suggestion for each of us:

- **President Obama.** Please continue to give your task force on campus sexual violence a true mandate for prevention. Empower it to advocate for the

<sup>2</sup> And, we don't like to label a rape as an "interaction," but neutral terms work best in these circumstances, because we can't assume an accused student is a perpetrator, either.

resources that campuses need to fully embrace the compliance and prevention missions that the law imposes.

- **Campus Presidents.** Allocate at least \$250k annually to a prevention budget. You'll make it up in the long run through loss prevention. Really. Additionally, we beseech you to streamline your policy-making process. OCR and the courts are averaging at least two pronouncements each year that require revisions to campus policy. Your campus policymaking process needs to be agile enough to keep up with this new pace of change, and on most campuses, that process is woefully unable to do so.
- **Chief Student Affairs Officers.** Campus SaVE Act Compliance (VAWA Section 304) is largely going to fall on your division, and it is time to get ready. Prevention must be professionalized under your division, with something like a Campus Prevention Services Office or Campus Prevention Committee that is well-staffed and well-resourced.
- **Orientation and First Year Experience Professionals.** Please lead conversations on your campuses for how to mandate educational and prevention programming beyond the first year and work with faculty to develop cross-curricular programming in these and related areas.
- **Deans of Students.** Devise a points system or other effective mechanism to get student butts in the seats, so that they attend the presentations you provide. No one will benefit from campus prevention efforts if those efforts are not delivered to the audience who needs to hear them. Conduct regular campus climate surveys with a three-year action plan to address the survey findings and remedy any hostile climate issues that are evident.
- **Campus investigators.** Do more than attend the two-day ATIXA training. We've done investigations for more than fifteen years to learn what we know how to do. With two days of training, you've made a start, but to do right by all of our campus constituents, and to do justice to the complexity of these cases, you must invest in your own professional development with diligence and hard work. If you make training a continual task, excellence will follow.
- **Title IX Coordinators.** Make sure your president and trustees understand the enormity of your role. Yours is a full-time, dedicated role, whether your position is or not. Fight for your authority to be the final say on Title IX on your campus. You need a budget, a direct or dotted line to your president, and the authority to effectuate the changes compliance requires. Oh, and in your spare time, help your campus Public Safety and Student Affairs professionals to meet the prevention, education and training mandates of the SaVE Act. They're big.
- **FIRE.** Live up to your name. Don't just fight for the rights of accused students. Fight for the individual rights of all students. If a campus puts a gag order on a victim, where is your voice in favor of her rights to share her story?
- **Student Conduct professionals.** You can't be too hot or too cold, you need to get it just right. Some of you are too hot, meaning that you hold men accountable for drunken hook ups that shouldn't violate campus policies.

Charging only the male if both parties are drunk (not incapacitated) is gender discrimination. In some cases where you find a preponderance, some of you have your thumbs on the scales of justice. A tie must go to the accused student. In other cases, you're too cold, and you don't ensure that victims get their due, and that perpetrators are kicked out. The just right bowl of porridge is neither too hot nor too cold, and the equal dignity we owe to all of our students requires that we get it right, every time. We also ask you to become more effective gatekeepers on the process. Not every complaint deserves a hearing. Many complaints can be resolved through investigation, and when the investigation shows that no misconduct took place, bring the gate down and stop the process. It can be victimizing to all parties to continue the process beyond that point. Please reconsider imposing gag orders on the parties to a complaint. Title IX requires you to maintain the confidentiality of an investigation. It does not give you the right to deprive students of their right to talk about their experiences and tell their stories. We also suggest you get used to welcoming attorneys as advisors in your processes. We're coming sooner or later (now that the SaVE Act is in effect), and we can't imagine many students involved in sexual misconduct complaints navigating the campus process very well without us, to be blunt.

- **Public Safety.** Continue to train officers to believe victims and not to blame them. You're not the ultimate deciders of fact, and don't need to take sides. Consider that higher crime statistics mean safer campuses, not the other way around. Assist campus civil rights investigations, and partner with the Title IX Coordinator and Student Affairs to deliver the training and prevention content the law requires.
- **Know Your IX, Ed Act Now, End Rape on Campus and other student voices.** Continue to push higher education and OCR to do better, partner with us where you can, teach us about your expectations, and be open to the possibility that some of the cases you believe in are harder to prove than you think, and in some cases, may not constitute a violation of policy.
- **OCR.** Go further to make your case decisions open and transparent. Publish regular, consistent guidance. Higher education is hungry for it. Open a technical assistance department staffed just as well as your enforcement division. If you do, you might slowly realize you'll need your enforcers less, and that compliance will improve.
- **Faculty.** Please be open to changing your privileged discipline processes, because you are the only ones who can. Equity is an inherent good for all of us, and complex, drawn-out discipline processes, multiple layers of appeal, grievance processes and tenure revocation systems all impede equitable resolution of sex and gender discrimination complaints involving faculty. We must protect our faculty members who are accused, but we must equally protect those who accuse them.
- **Human Resources.** It is no longer acceptable to be unaware that Title IX applies to employees in any situation where Title VII also applies to address sex/gender discrimination on a college campus. Many of the mandates for prevention and

training in Title IX and the Campus SaVE Act apply to employees. They are breathtakingly broad and your institution is going to need more than the same animated online tutorial on sexual harassment every year to address them.

- **Campus LGBTQI Resources.** We shouldn't need this reminder, but please keep institutions focused on the ways that Title IX covers gender identity discrimination, transgender individuals, those in transition, and those who are gender nonconforming, and make sure we continue to acknowledge that not every case of sexual violence is male-on-female or occurs in exclusively heterosexual contexts.
- **Campus Victim Advocates.** Victims need at least one human being who believes them 100%. It may not be their parents, friends, or loved ones. Be there for them unequivocally, but please understand that institutions are obligated to protect not just the victim you are helping, but future victims as well. Campuses try to honor each victim's wishes, but if they pursue a complaint against the wishes of the victim, it is not to harm him or her, but to protect others from the same harm. If the campus does not uphold your victim's complaint, it may not be that they don't believe him or her. It may be that they don't have the evidence to show a violation. But, campuses still need to provide services, supports and remedies no matter what.
- **Athletics.** Strive for equity of facilities, participation, scholarships, uniforms, coaching, and athletics opportunities. Report what you hear to the Title IX Coordinator, and never forget that your athletes are, first and foremost, our students. Their status as athletes doesn't change the fact that they are protected by campus policies and subject to campus rules. Special training for athletes and coaches is needed to address the circumstances inherent in closed campus athletic communities.
- **Counselors and Health Services.** You know more about campus victimization rates than anyone else. But, many of you do not report statistics on sexual violence (and soon, dating violence, domestic violence, and stalking). I ask you to voluntarily invert the Clery Act reporting paradigm. At present, counselors may volunteer statistics when they choose to. We suggest that reporting anonymous, non-personally-identifiable, statistical information should be the standard for you. But, you can make discretionary decisions not to report if you believe it would harm your client or patient to do so. Will you help us understand our climate and the extent of campus crime if it won't harm your clients in any way?
- **Students.** A community is a place where the members look out for one another. When you are a bystander to the safety of the community, you fail to contribute to making your campus a socially just community. Engage, intervene and look after each other. You won't always make the best choices, but a safety net can help to ensure you don't always suffer for them.
- **Victims.** If anyone has sexual contact with you by force, without your clear consent by word or by action, or where they know or should know that you are physically incapacitated (often by alcohol or other drugs), you have the right to

have your college remedy the effects of what has happened to you. You can make a confidential report, or a formal complaint, and/or report to police. Title IX also protects you if you are stalked, if you experience intimate partner violence, sexual harassment, or other forms of sex/gender discrimination.

- **Sexual Aggressors.** Take no for an answer. Ask for a yes. Don't make assumptions. You're not entitled to sex, and if you take it without permission, you're going to get kicked out of college.
- **Registrars.** And, the institution is going to note it on your transcript. It's the ethical thing to do.
- **The NCHERM Group.** We will continue to support all of you as you work earnestly to achieve compliance. This summer, we'll release our strategic prevention curriculum, to provide you with the content you need to comply with the education and training mandates of Title IX and the Campus SaVE Act. We have an online suite of trainings already available for mandated reporters, hearing boards and appeals officers. More online trainings are scheduled throughout 2014-2015 on the topics you need to assure gender equity within your campus communities.

Thank you for your dedication and determination.

Sincerely,

Brett A. Sokolow, Esq.

President & CEO, The NCHERM Group, LLC

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## ATTACHMENT D



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February 28, 2014

White House Task Force to  
Protect Students from Sexual Assault  
United States Department of Justice  
Office on Violence Against Women  
145 N Street NE  
Suite 10W.121  
Washington, DC 20530

Dear Members of the Task Force:

On behalf of RAINN, I write to offer comments and recommendations to the White House Task Force to Protect Students from Sexual Assault.

RAINN is the nation's largest anti-sexual violence organization. RAINN operates the National Sexual Assault Hotline (800.656.HOPE and [online.rainn.org](http://online.rainn.org)), which has helped more than 1.9 million people since its creation in 1994 (the telephone hotline is run in partnership with more than 1,000 local sexual assault service providers). RAINN also operates the DoD Safe Helpline on behalf of the Department of Defense. Additionally, RAINN carries out programs to prevent sexual assault, help victims, and ensure that rapists are brought to justice. We are encouraged by the renewed national focus on issues of campus sexual assault and are pleased to offer our perspective, which is based on our experience working on prevention on hundreds of college campuses and helping thousands of college students recover from their attack.

One out of every six women and one out of every 33 men are victims of sexual assault<sup>1</sup> – 20 million Americans in all. Those of college age are more likely to be victimized than any other age group. According to the Department of Justice, on a campus of 10,000 students, as many as 350 women may be victims of sexual assault each year. And alarmingly, the Department of Justice (DOJ) estimates that just 12% of college victims report their assault to law enforcement officials.<sup>2</sup> This is far below the rate of the general population, where about 40% of all sexual attacks are reported to police, according to DOJ.

#### **RAINN's Work on Issues of Campus Sexual Assault**

For two decades, RAINN has led efforts to prevent and better respond to on-campus crimes of sexual assault. On the public policy front, we supported passage of the Campus

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SaVE Act and look forward to the implementation of its requirement that campuses, by October 1, 2014, establish a comprehensive policy and plan for tackling these issues in their communities.

In addition to advancing policy reforms, RAINN works hand-in-hand with college students and officials. RAINN coordinates an annual day of action ("RAINN Day") to educate students about preventing and recovering from sexual violence on college campuses. For the most recent RAINN Day, in September 2013, RAINN partnered with MTV and nearly 300 college campuses across the country. In the last 10 years, the program has educated millions of college students and administrators across the country.

### **Perpetrators of Campus Sexual Assault: What We Know**

In the last few years, there has been an unfortunate trend towards blaming "rape culture" for the extensive problem of sexual violence on campuses. While it is helpful to point out the systemic barriers to addressing the problem, it is important to not lose sight of a simple fact: Rape is caused not by cultural factors but by the conscious decisions, of a small percentage of the community, to commit a violent crime.

While that may seem an obvious point, it has tended to get lost in recent debates. This has led to an inclination to focus on particular segments of the student population (e.g., athletes), particular aspects of campus culture (e.g., the Greek system), or traits that are common in many millions of law-abiding Americans (e.g., "masculinity"), rather than on the subpopulation at fault: those who choose to commit rape. This trend has the paradoxical effect of making it harder to stop sexual violence, since it removes the focus from the individual at fault, and seemingly mitigates personal responsibility for his or her own actions.

By the time they reach college, most students have been exposed to 18 years of prevention messages, in one form or another. Thanks to repeated messages from parents, religious leaders, teachers, coaches, the media and, yes, the culture at large, the overwhelming majority of these young adults have learned right from wrong, and enter college knowing that rape falls squarely in the latter category.

Research supports the view that to focus solely on certain social groups or "types" of students in the effort to end campus sexual violence is a mistake. Dr. David Lisak estimates that three percent of college men are responsible for more than 90% of rapes.<sup>iii</sup> Other studies suggest that between 3-7% of college men have committed an act of sexual violence or would consider doing so. It is this relatively small percentage of the population, which has proven itself immune to years of prevention messages, that we must address in other ways. (Unfortunately, we are not aware of reliable research on female college perpetrators.)

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Consider, as well, the findings of another study<sup>iv</sup> by Dr. Lisak and colleagues, which surveyed 1,882 male college students and determined that 120 of them were rapists. Of those determined to be rapists, the majority — 63% — were repeat offenders who admitted to committing multiple sexual assaults.<sup>v</sup> Overall, they found that each offender committed an average of 5.8 sexual assaults.<sup>vi</sup> Again, this research supports the fact that more than 90% of college-age males do not, and are unlikely to ever, rape. In fact, we have found that they're ready and eager to be engaged on these issues. It's the other guys (and, sometimes, women) who are the problem.

### **Preventing Sexual Assault on College Campuses**

The federal government has, with this task force, an unprecedented platform to deliver a national message of zero tolerance for sexual violence on college campuses and to push for the spread of prevention programs. But we urge the task force not to hurriedly endorse a single message or marketing campaign or rush to create a new one. The fact is, there is a real dearth of reliable data on what works. Because of this, the role of the federal government should be to encourage innovation and sponsor rigorous evaluation, rather than force the adoption of specific programs.

There is no shortage of campaigns designed to deliver anti-sexual violence awareness and prevention to college-aged students and other members of the community. While many of these programs seem promising, research to date is insufficient to allow us to know how effective they are or to identify best-in-class programs. There is also insufficient research to know if one-size messages work, or if (and how) they should be tailored for audiences such as male or LGBT survivors or those with disabilities.

The federal government should seize this opportunity to conduct a meaningful evaluation of existing campaigns and a research-informed assessment of what messages have been most effective toward the ultimate goal of stopping rape before it occurs and keeping these serial criminals off our streets and college campuses. These evaluations should focus on the true end goal, reducing rape, not intermediate goals such as changing attitudes (despite the fact that these intermediate goals are vastly easier to measure).

Perhaps counter-intuitively, we recommend not focusing prevention messaging towards potential perpetrators (with one exception, described below). Importantly, research has shown that prevention efforts that focus solely on men and "redefining masculinity," as some programs have termed it, are unlikely to be effective. As Dr. Lisak has noted,<sup>vii</sup> we can benefit from decades' of sex offender treatment work, which supports that it is all but impossible to reprogram a serial offender with a simple prevention message.

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There is one other area in which the federal government can play a productive role: using its research expertise to conduct frequent anonymous surveys on a variety of campuses, in order to measure the rate of sexual violence and the impact of individual campus prevention programs. As a bipartisan group of 39 legislators said in a letter<sup>vi</sup> to the Department of Education, such surveys can help us obtain a more accurate understanding of the extent of sexual violence on campuses. Leadership from the federal government, to ensure that the surveys yield uniform and constructive data, would be very valuable.

RAINN recommends a three-tiered approach when it comes to preventing sexual violence on college campuses. A prevention campaign should include the following elements:

1. Bystander intervention education: empowering community members to act in response to acts of sexual violence.
2. Risk-reduction messaging: empowering members of the community to take steps to increase their personal safety.
3. General education to promote understanding of the law, particularly as it relates to the ability to consent.

You may note that we have not used the term "primary prevention," which is widely used in the field. That is because we have a different definition of primary prevention than many. We believe that the most effective — the primary — way to prevent sexual violence is to use the criminal justice system to take more rapists off the streets. Stopping a rapist early in his or her career can prevent countless future rapes. Because increasing reporting and vigorous prosecution are better addressed in the context of response to sexual assault, we discuss this further in the crime section below. This approach should, of course, continue to be complemented by education and outreach campaigns targeted towards younger, more malleable populations.

#### *Bystander Intervention*

Bystander intervention messaging is an unproven, but promising, approach, and we recommend expanding its use in the context of combatting sexual violence on campuses. Changing social norm so that students feel a responsibility to watch out for friends, and intervene before a friend becomes a victim or perpetrator, should be encouraged and supported by the federal government. The task force should also encourage the use of technology to disseminate bystander education, which needs to be repeated and specific to be useful.



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#### *Risk Reduction*

As anyone who has worked on rape prevention knows, risk-reduction messaging is a sensitive topic. Even the most well-intentioned risk-reduction message can be misunderstood to suggest that, by not following the tips, a victim is somehow to blame for his or her own attack. Recent survivors of sexual violence are particularly sensitive to these messages, and we owe it to them to use them cautiously.

Still, they are an important part of a rape prevention program. To be very clear, RAINN in no way condones or advocates victim blaming. Sexual assault is a violent crime and those who commit these crimes are solely responsible for their actions. That said, we believe that it is important to educate members of a campus community on actions they can take to increase their personal safety. In fact, we believe it's irresponsible not to do so.

Over decades, it has been shown that risk-reduction messaging is an important component of crime prevention overall. This approach has significantly contributed to reducing the number of violent and property crimes. It has a similar value in sexual violence prevention.

Many institutions incorporate risk-reduction tips into their awareness messaging and we encourage the federal government to support this type of messaging.\* Many respondents — survivors, faculty, and others — to our survey on the issue of campus sexual assault (see Appendix) endorsed this view as well. This recommendation is intended to impart tools of empowerment, not victim blaming.

#### *Promoting Understanding of the Law*

Notwithstanding our point above about the futility of directing prevention messages to potential college perpetrators, there is one area in which such messages can have a salutary effect. In our public education work, we consistently encounter confusion about the definition of consent, particularly in cases in which one or both parties have consumed alcohol or drugs. Students receive a tremendous amount of conflicting (and often erroneous) information about where "the consent line" is.

Some campaigns and websites claim that the ingestion of even a single drink renders someone unable to legally consent, while conversely others explain that anyone short of unconscious can consent (in fact, the standard varies by state; most common is an "incapacitation" standard, which itself is not always well defined in law). Still others giving advice to students use imprecise, and therefore unhelpful, words such as "buzzed" to describe the line.

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It's no wonder that many students are confused — and would benefit from clearer education. (For a similar reason, education should avoid terms that have no real legal meaning, such as "date rape.") This is one area in which technology can play a big role. Videos, interactive apps and websites should be utilized to explain, and demonstrate, the educational information much needed by students.

### **Responding to Sexual Assault on College Campuses**

Despite the best prevention efforts, we know that these crimes will continue to occur on America's college campuses. Below, we offer recommendations for improvements to the response to these crimes, in furtherance of the overall goal of preventing future crimes and taking serial criminals off the streets.

#### *Establish and Disseminate Clear, Concrete, Campus-Specific Policies and Procedures*

Students and other members of the campus community need to know — *before* an event occurs — what to expect in the wake of a crime of sexual assault. To whom should these crimes be reported? What will occur in the wake of such a report? What medical and mental health supports are available (on campus and off)? What role will law enforcement have? Which members of the campus community are mandated reporters? What are the victim's rights in the process?

A handful of federal laws and guidance documents have created a murky landscape of protocols, procedures and punishments for these crimes. Discussing this with college administrators working to navigate this system, it is exceedingly clear that even the most highly informed and best intentioned are confused. Similarly, students, particularly survivors, find the entire process confusing and difficult to navigate in the wake of their trauma. Both have expressed confusion about community notification and Clery Act compliance; about who needs to report what and when; about who will investigate and what that process looks like; about how victims' requests for confidentiality can and should be honored. They are also confused about what punishments are (or should be) in place for offenders and what accommodations can be made available for those who report being attacked. They are confused about the value of the criminal justice response, the available reporting options, and likely outcomes in the event there are charges filed.

All this confusion discourages victims from coming forward to take the brave step of reporting this crime. If we expect victims to come forward and work with us to hold perpetrators accountable, then we need to demonstrate that their claims will be taken seriously, that these incidents will be treated as the crimes they are and their perpetrators



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as the serial criminals that, by and large, they are, and that clear systems and procedures will be in place to support them through the process.

Federal law requires nearly every college campus to, by this October 1, formalize a comprehensive sexual assault policy and establish training curricula for all members of the campus community. The law requires these policies to include information about reporting procedures, what to do and expect after a report is made, victims' rights, and many of the other topics we've noted are the source of ongoing confusion. We encourage the federal government to ensure that the promise of this law is fulfilled.

While we remain hopeful that school administrators and officials will dedicate significant thought to this process, RAINN is concerned by reports that some schools have taken a haphazard approach in this area. For example, while preparing to file a Clery complaint against her alma mater, the University of Ohio, Akron, a 2011 graduate discovered that the school's sexual assault policy appeared to be little more than a plagiarized conglomeration of other schools' policies. Some of the provisions, disturbingly, cited policies or practices that were inapplicable to her school and campus.\*

There are, no doubt, other examples like this. We therefore encourage the federal government to strictly enforce the requirements of the Campus SaVE Act and establish a mechanism for reviewing schools' policies and publicly sharing best practices so that other campuses can benefit from what's working well for their counterparts.

#### *Enhancing Victims' Access to Support and Care Services*

Critical to this effort are steps to ensure that students and other members of the campus community who experience sexual violence are met with comprehensive services.

#### *Expanded Options for Care and Information*

We must ensure there are multiple channels through which victims can come forward to get information and recovery help. The likelihood of a victim reporting the crime (and, thereby, potentially setting off a chain reaction of support services and potential prosecution) stands to increase in direct proportion to their awareness of and the availability of opportunities for help.

The federal government should require campuses to share, with all members of the campus population, information about on-campus resources, those such as rape crisis centers in the surrounding community, and national resources such as the National Sexual Assault Hotline (800-656-HOPE) and National Sexual Assault Online Hotline ([online.rainn.org](http://online.rainn.org)).

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The federal government should also, in keeping with recommendations published in the Justice Department's recent *Vision 21 Report*,<sup>xi</sup> support innovative technology designed to reach college-aged students (38% of whom, in a recent survey, said they couldn't go more than 10 minutes without checking their smartphones or other electronic devices).<sup>xii</sup> This presents a key opportunity: the federal government must encourage and support programs that utilize technology and social media to deliver education, prevention, and support around campus sexual violence.

#### *Access to Medical Care and Sexual Assault Specialists*

Access to comprehensive medical care and services in the immediate aftermath of sexual assault is vitally important. Each victim of an on-campus sexual assault should be educated on where care can be accessed (at any time of day) and should be encouraged to undergo a sexual assault forensic examination (and educated on why that can be important to holding their rapist accountable). If a sexual assault nurse examiner is not available on campus, victims should be offered free transportation to a hospital or facility that does offer these services (whether in person or through telemedicine), if available.

#### *Enhanced Victim Support Systems*

Victims of campus sexual assault need support systems when they come forward to report the crime. Victims can benefit from trained volunteers or staff who can help them navigate the minefield that a report of sexual assault can expose. We would encourage campuses to appoint a victim services coordinator (and support staff) to work directly with victims, help them understand their options and rights, accompany them to medical and legal proceedings, and help them cope with the aftermath of their assault (while ensuring that such staff have similar training, and enjoy similar confidentiality privilege protections, as other sexual assault service providers). This point person could help ensure that the student knows about any accommodations the university may make for them (for instance, options regarding housing transfers or class schedule adjustments). In the absence of a specific on-staff point person (or persons), schools should establish a system for training volunteers, R.A.'s, existing faculty members, or others to serve in this capacity.

#### **Treating this as a Crime: Encouraging Reporting and Enhancing Partnerships and Coordination with Law Enforcement**

Rape is all too often a crime without consequences. In America, out of every 100 rapes, only 40 are reported to police, and only three rapists will ever spend a day behind bars. On college campuses, the situation is even worse: according to the Justice Department, one in



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every five women will be sexually assaulted while in college, yet just 12% report the assault to law enforcement.

This disturbingly low reporting rate amounts to a massive missed opportunity in the fight against campus sexual assault. When these crimes aren't reported, not only do victims often fail to receive the vitally important services and supports they need (as they are more likely to suffer a host of long-term health effects),<sup>xiii</sup> but serial criminals are left unpunished and free to strike again. And the message this sends to the broader community and future offenders? You can rape with impunity; that's just what happens in college.

We can, and must, do better if we ever hope to make real progress combatting this problem. The task force can and should advance this goal by supporting partnerships between colleges and universities and local law enforcement.

Formalizing the role and responsibility of law enforcement in the response to on-campus sexual violence isn't simple, particularly as college police forces vary widely in their powers and responsibilities and relationship to surrounding law enforcement agencies. It raises legitimate concerns that must be thoughtfully addressed, such as how to handle victims' desire to remain anonymous or to decline prosecution. There are also very real, practical resource constraints. But in the end, until we find a way to engage and partner with law enforcement, to bring these crimes out of the shadows of dorm rooms and administrators' offices, and to treat them as the felonies that they are, we will not make the progress we hope.

#### *De-emphasize Internal Judicial Boards*

The FBI, for purposes of its Uniform Crime Reports, has a hierarchy of crimes — a ranking of violent crimes in order of seriousness. Murder, of course, ranks first. Second is rape. It would never occur to anyone to leave the adjudication of a murder in the hands of a school's internal judicial process. Why, then, is it not only common, but expected, for them to do so when it comes to sexual assault? We need to get to a point where it seems just as inappropriate to treat rape so lightly.

While we respect the seriousness with which many schools treat such internal processes, and the good intentions and good faith of many who devote their time to participating in such processes, the simple fact is that these internal boards were designed to adjudicate charges like plagiarism, not violent felonies. The crime of rape just does not fit the capabilities of such boards. They often offer the worst of both worlds: they lack protections for the accused while often tormenting victims.

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We urge the federal government to explore ways to ensure that college and universities treat allegations of sexual assault as they would murder and other violent felonies. The fact that the criminal justice process is difficult and imperfect, while true, is not sufficient justification for bypassing it in favor of an internal system that will never be up to the challenge.

While there are undoubtedly university officials wholeheartedly committed to treating these claims with seriousness, and examples of campuses independently doing the "right thing" in the wake of claims of sexual violence, stories abound of the mishandling of such cases. In just recent months, reports of mishandled cases at USC, Dartmouth College, Swarthmore College, University of Montana, Vanderbilt University, Occidental College, Penn State University, the University of Connecticut, the University of North Carolina, and Berkeley have flooded the Department of Education.<sup>xiv</sup> In fact, in 2013 alone, the department's Office on Civil Rights received 30 complaints against colleges and universities around these issues – a 76% increase over the prior year, when 17 complaints were filed. The complaints say the schools violated students' civil rights by not thoroughly investigating sexual assaults, and failed to obey Clery Act mandates around tracking and disclosure of these crimes. And while significant fines have been levied against a handful of institutions (notably a \$165,000 fine imposed on Yale University), enforcement of Clery Act requirements and response to on-campus claims of sexual assault has been uneven.

It is, therefore, imperative that colleges and universities partner with local law enforcement around these crimes – from the time of report to resolution. In practical terms, this means ensuring that campus protocols and policies explicitly spell out what that partnership looks like – who is responsible for reporting an alleged crime to law enforcement? When must that occur and how will a victim be involved in that process (to address legitimate concerns around confidentiality, maintaining control over decision-making, etc.)? What procedures will on-campus health officials utilize to ensure, whenever possible, evidence collection occurs in the wake of a sexual assault? The answers to these questions will vary from campus-to-campus, jurisdiction-to-jurisdiction.

We urge the federal government to establish best practices in the area of law enforcement/campus partnerships to address incidents of sexual violence, and to support efforts to institutionalize such partnerships. We also urge the task force to consider the adoption of a system similar to the Defense Department's, which allows for "restricted" reports that enjoy a level of confidentiality, in addition to standard reports. Given the overall importance of informed decision making by victims of sexual assault, we also refer you to DoD's process of a trained advocate walking a victim through a form<sup>xv</sup> outlining the victim's rights, options, etc., before a report is filed.

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### **Additional Recommendations and Comments From the Community**

When this Task Force was announced, RAINN issued a survey to 100,000 supporters, requesting input from the community on this issue. We received an overwhelming number of responses from survivors, victim advocates, law enforcement personnel, campus officials and faculty members, prosecutors, and others. For your consideration, we have summarized some of the most common and most powerful suggestions in the appendix to this letter. Many responses echo our own recommendations above.

### **Conclusion**

To summarize some of our key points:

Colleges and universities must:

- Take the crime of sexual assault seriously and impose meaningful, public sanctions when wrongdoing is found and crimes are substantiated.
- Investigate every claim of sexual assault reported.
- Partner with local law enforcement on each investigation, starting immediately after a crime is reported.
- Ensure victims have access to comprehensive support systems (campus, local and national) and forensic medical exams.
- Ensure that campus policies and procedures are comprehensive and campus-specific.
- Educate the campus community on their rights and roles in the wake of sexual violence, including information about bystander intervention and risk-reduction.
- Educate all members of the campus community on the school's policies and procedures in the wake of a claim of sexual assault, and communicate, from the top down, a zero-tolerance policy of sexual violence.

The federal government should:

- Spearhead and invest in rigorous, continuing research to assess what messaging is (and is not) working to further the overall goal of decreasing sexual violence on campus and taking rapists off our college campuses and streets.
- Impose meaningful sanctions for violations of federal law, including the Clery Act and Campus SaVE Act.
- Support innovative approaches and technologies to ensure that there is transparency around this issue, and to enhance schools' ability to respond to and prevent sexual violence.

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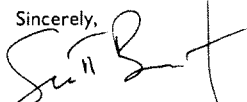



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- Require all colleges and universities to disseminate to all members of the campus community the phone number and URL for the National Sexual Assault Hotline in addition to campus and local resources.

Thank you for the opportunity to provide perspective and recommendations on this critical issue. Please do not hesitate to contact me with questions. I look forward to continuing to work with you towards our shared goal of eliminating sexual violence on campuses.

Sincerely,

  
Scott Berkowitz  
President

  
Rebecca O'Connor  
Vice President for Public Policy

<sup>i</sup> National Institute of Justice & Centers for Disease Control & Prevention, *Prevalence, Incidence and Consequences of Violence Against Women Survey*, 1998.

<sup>ii</sup> White House Council on Women and Girls, *Rape and sexual Assault: A Renewed Call to Action*, January 2014, at 15, citing Kilpatrick, D.G., Resnick, H.S., Ruggerio, K.J., Conoscenti, L. M., & McCauley, J. (2007). *Drug facilitated, incapacitated, and forcible rape: a national study* (NCJ 219181). Charleston, SC: Medical University of South Carolina, National Crime Victims Research and Treatment Center.

<sup>iii</sup> Greenfield, L.A. *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault*, Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, 1997.

<sup>iv</sup> Lisak, D. & Miller, P.M., 2002. "Repeat Rape and Multiple Offending Among Undetected Rapists." *Violence and Victims* 17(1), 73-84.

<sup>v</sup> *Id.*

<sup>vi</sup> *Supra*.

<sup>vii</sup> See, Lisak, D., *Understanding the Predatory Nature of Sexual Violence*, at 8. Available at: <http://www.middlebury.edu/media/view/240951/original/>

<sup>viii</sup> Text available at: <http://www.scribd.com/doc/203276038/Campus-Sexual-Assault-Letter-Speier-Mahoney> and the University of Chicago (<http://csl.uchicago.edu/get-help/resources-sexual-violence-prevention>)

<sup>ix</sup> Baker, Katie J.M., "Does it Matter If Colleges Plagiarize their Sexual Assault Policies?" *Newsweek*, February 5, 2014. Available here: [www.newsweek.com/does-it-matter-if-colleges-plagiarize-their-sexual-assault-policies-228086](http://www.newsweek.com/does-it-matter-if-colleges-plagiarize-their-sexual-assault-policies-228086).

<sup>x</sup> Available here: <http://ovc.ncjrs.gov/vision21/outcome.html>

<sup>xi</sup> See, <http://mashable.com/2012/05/06/tech-college-infographic/>

<sup>xii</sup> Survivors of sexual violence are at an increased risk for depression, PTSD, substance abuse, suicide, and sleep disorders. For additional information, see: <https://www.rainn.org/get-information/effects-of-sexual-assault>

<sup>xiii</sup> The following Universities have had a federal complaint filed against them: Penn State University, Dartmouth College, Harvard Law School, Princeton University, University of North Carolina at Chapel Hill, Amherst College, Vanderbilt University, University of California, Berkeley, University of Southern California, Occidental College, University of Colorado, Boulder, Swarthmore College, Hanover College, University of Connecticut, Cedarville University, Emerson College, University of Virginia, Carnegie Mellon University, University of Akron, University of Texas-Pan American, Hobart and William Smith Colleges, University of Chicago, University of Montana, Yale University, University of Notre Dame, University of Missouri, Oklahoma State University, University of Indianapolis, Florida State University, Columbia University.

<sup>xiv</sup> See, e.g., DD 2910 form at <http://www.sapr.mil/public/docs/miscellaneous/toolkit/dd2910.pdf>

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**APPENDIX  
COMMENTS TO THE WHITE HOUSE TASK FORCE  
TO PROTECT STUDENTS FROM SEXUAL ASSAULT  
February 28, 2014**

**Methodology**

Between January and February 2014, RAINN conducted an online survey of members of the sexual assault community, requesting their responses to the following questions:

1. What should colleges do differently to prevent sexual violence?
2. How should colleges improve the way they handle or investigate a reported sexual assault?
3. How can colleges improve the way they treat victims of sexual assault?

Respondents were invited to identify themselves as a student, survivor, faculty/administration member, and/or other, or to remain anonymous.

**Summary of Responses**

The most common themes in the comments we received were:

- Take this issue and each and every claim of sexual violence seriously.
- Do not handle investigations in-house. Involve local law enforcement and other system actors.
- Believe victims when they come forward, and establish systems of support throughout the process that unfolds.
- Assess what's working (and what isn't). Bring in third parties to audit this.
- A zero tolerance message is essential, but will only work if it comes from the top (university presidents) and if it has teeth (imposition of meaningful sanctions).
- Training and education is important – there can never be too much on this topic, and it has to start early.
- Make the system transparent: tell people who should and can report and how, and where help (both on-campus and off) is available.

Select responses are summarized and provided below, grouped by general topic of remark.

**Take and treat this issue seriously.**

Overwhelmingly, the top response to our survey was the sentiment that colleges and universities need to treat sexual violence as a serious crime. Over and over again, survey respondents said that if anything is going to change, schools must take each and every allegation of sexual violence seriously.

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"We faculty teach students throughout the semester how serious plagiarism is. Why not do the same for rape?"

- *faculty member*

"Don't say things like 'boys will be boys' or 'he lacks emotional intelligence.'"

- *student and survivor*

"We need support from the top. College administrators should directly engage with campus communities on sexual assault. We need to hear about this from the highest level."

- *faculty member*

**Investigate each and every claim; involve law enforcement.**

Multiple respondents lamented the practice of colleges and universities handling claims of sexual violence and subsequent investigations and proceedings "in house."

"Unless there are more convictions, these crimes will continue to go unreported. In my situation, those who attacked me were not only aware of the conviction rate – they told me what it was. This must be changed."

- *college administrator*

"Handle incidents of sexual crime through municipal law enforcement rather than through college channels which only try to keep the school's name out of the press."

- *alumnus; friend of multiple survivors*

"College administrators should not be replacing the criminal justice system."

- *mother of survivor*

"External, independent investigations [are] the only way to assure an unbiased investigation."

- *survivor*

**Impose meaningful, not ceremonial punishments.**

Another common refrain was the need to go beyond telling the campus community that these crimes are taken seriously – respondents cited the need to demonstrate that through meaningful, not ceremonial, punishments and sanctions.

"Stop the culture of impunity for rapists. If rapists on campus faced the same penalties for rape as rapists off campus, there would be considerably less rape. Light sanctions only give a green light to rape, and make a campus a 'free-rape zone' instead of a 'rape-free zone.'"

- *faculty member*

"If we don't expel students for rape, what do we expel them for?"

- *faculty member*

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"The offender should be [upon conviction] permanently removed from campus. Too often the victim transfers to another university when the offender is permitted to come back and resume classes."

- *student and survivor*

"Mandate suspension or expulsion for students that are legally convicted of rape or sexual assault from the university. Punish students that harass survivors for reporting rape or attempting to intimidate them..."

- *student and survivor*

#### **External Assessment**

More than one respondent suggested that the federal government mandate third-party audits of schools' sexual assault policies and procedures.

"Institute independent, third party audits of protocols."

- *faculty member/administrator*

#### **Coordinated Community Response**

"Colleges should be included in the local SART (sexual assault response team) in the community. If they don't have one, one should be formed. This should include campus police, as well as law enforcement in the community, the district attorney's office, sexual assault advocates and SANEs, and others."

- *Sexual assault service provider in a college town*

#### **Enhanced Support and Accommodations for Alleged Victims**

"Colleges should perhaps have two counselors on staff – one male, one female – who are educated psychologists (or other professionals) specifically trained to deal solely with issues of sexual assault (either on or off-campus)."

- *student and survivor*

"Make policy clear that students' health and safety come before getting in trouble for underage drinking/drug use. The student needs to feel that their school is a safe place to talk about sexual assault and a good resource for related services."

- *student and survivor*

"Trained and effective counselor, trained big brothers/sisters style support [for victims]."

- *student and survivor*

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"Living quarters changes [for the alleged victim], zero-cost option to take an absence from classes, the option to resume a class at the same point with the same accumulated grade point the next semester."

- *student and survivor*

"Immediate options for administrative support such as changing the victim's or the accused's class schedule."

- *student and survivor*

"Information about where I could have gotten help and reported things online would have been huge."

- *survivor*

#### **Increased Security Measures**

"Increased campus security presence (and training so that they know how to help and respond to these types of crimes)."

- *student*

"An app or other service that lets you call for help on campus with just a push of a button on your cell phone."

- *student and survivor*

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## ATTACHMENT E

# THE WALL STREET JOURNAL.

## Yes Means Yes—Except on Campus

The feds tip the scales against due process in sexual misconduct cases.

By HARVEY A. SILVERGLATE

For a glimpse into the treacherous territory of sexual relationships on college campuses, consider the case of Caleb Warner.

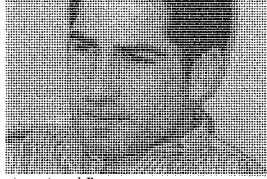
On Jan. 27, 2010, Mr. Warner learned he was accused of sexual assault by another student at the University of North Dakota. Mr. Warner insisted that the episode, which occurred the month prior, was entirely consensual. No matter to the university: He was charged with violating the student code and suspended for three years. Three months later, state police lodged criminal charges against his accuser for filing a false police report. A warrant for her arrest remains outstanding.

Among several reasons the police gave for crediting Mr. Warner's claim of innocence was evidence of a text message sent to him by the woman indicating that she wanted to have intercourse with him. This invitation, combined with other evidence that police believe indicates her untruthfulness, has obvious implications for her charge of rape.

Nevertheless, university officials have refused to allow Mr. Warner a re-hearing—much less a reversal of their guilty verdict. When the Foundation for Individual Rights in Education (FIRE), a civil liberties group of which I am board chairman, wrote to University President Robert O. Kelley to protest, the school's counsel, Julie Ann Evans, responded. She wrote that the university didn't believe that the fact that Mr. Warner's accuser was charged with lying to police, and has not answered her arrest warrant, represented "substantial new information." In any event, she argued, the campus proceeding "was not a legal process but an educational one."

Six weeks before FIRE received this letter, Russlynn Ali, assistant secretary for the Office for Civil Rights in the Department of Education, sent her own letter to every college and university in the country that accepts federal money (virtually all of them). In it, she essentially ordered them to scrap fundamental fairness in campus disciplinary procedures for adjudicating claims of sexual assault or harassment.

Ms. Ali's April 4 letter states that "in order for a school's grievance procedures to be consistent with the standards in Title IX [which prohibit discrimination on the basis of sex in any educational institution receiving federal funds], the school must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred)." This institutionalizes a low standard previously eschewed by most of the nation's top schools. It also sends the message that results—not facts—matter most. Such a standard would never hold up in a criminal trial.



*Associated Press*  
Caleb Warner

Following this outrageous diktat, Cornell University lowered its evidentiary burden in sexual assault cases. Now, determining whether an incident constitutes sexual violence is based on the "preponderance of the evidence" standard, instead of the school's prior "clear and convincing evidence" test. Stanford followed suit—in the middle of one student's sexual misconduct hearing. He was promptly found guilty and suspended for two years.

When Yale administrators received the government's letter, the university was under federal investigation for permitting gender discrimination on campus. The next month, on May 17, Yale announced that it would institute a five-year suspension of a fraternity that had engaged in a puerile but harmless initiation. Parading around campus, blindfolded pledges were told to shout tasteless slogans like "No means yes, yes means anal."

The university deemed this a sufficiently serious species of gender-based discrimination to justify official censorship. This, despite its "paramount obligation"—Yale's words—to uphold freedom of expression. And Yale, too, lowered its previous, higher evidentiary standard in sexual assault cases to the bottom rung.

Codes banning "offensive" speech in the name of protecting the sensibilities of what are commonly designated historically disadvantaged groups—and the campus kangaroo courts that enforce them—have long threatened free expression and academic freedom. While real-world courts have invalidated many of these codes, the federal government has now put its thumb decisively on the scale against fairness on issues of sexual harassment and assault.

Caleb Warner now goes without a diploma and carries with him the stigma of a sexual predator. Unfortunately, the government's policy ensures that his will not be a unique case.

*Mr. Silverglate, a lawyer, is the author of "Three Felonies a Day: How the Feds Target the Innocent" (Encounter Books, 2009). He is also the chairman of the board of directors of the Foundation for Individual Rights in Education.*

## ATTACHMENT F

1       **SECTION 5.(e)** This section is effective when it becomes law and applies to  
2 contracts entered on or after that date.

3  
4 **EQUAL TREATMENT FOR FRATERNITIES AND SORORITIES BY LOCAL**  
5 **GOVERNMENT**

6       **SECTION 6.(a)** G.S. 153A-340 is amended by adding a new subsection to read:

7       "(k) A zoning or unified development ordinance may not differentiate in terms of the  
8 regulations applicable to fraternities or sororities between those fraternities or sororities that are  
9 approved or recognized by a college or university and those that are not."

10       **SECTION 6.(b)** G.S. 160A-381 is amended by adding a new subsection to read:

11       "(g) A zoning or unified development ordinance may not differentiate in terms of the  
12 regulations applicable to fraternities or sororities between those fraternities or sororities that are  
13 approved or recognized by a college or university and those that are not."

14       **SECTION 6.(c)** Part 3 of Article 1 of Chapter 116 of the General Statutes is  
15 amended by adding a new section to read:

16 **"§ 116-40.11. Disciplinary proceedings; right to counsel for students and organizations.**

17       (a) Any student enrolled at a constituent institution who is accused of a violation of the  
18 disciplinary or conduct rules of the constituent institution shall have the right to be represented  
19 at the student's expense, by a licensed attorney or nonattorney advocate who may fully  
20 participate during any disciplinary procedure or other procedure adopted and used by the  
21 constituent institution regarding the alleged violation. However, a student shall not have the  
22 right to be represented by a licensed attorney or nonattorney advocate in either of the following  
23 circumstances:

24               (1) If the constituent institution has implemented a "Student Honor Court"  
25 which is fully staffed by students to address such violations.

26               (2) For any allegation of "academic dishonesty" as defined by the constituent  
27 institution.

28       (b) Any student organization officially recognized by a constituent institution that is  
29 accused of a violation of the disciplinary or conduct rules of the constituent institution shall  
30 have the right to be represented, at the organization's expense, by a licensed attorney or  
31 nonattorney advocate who may fully participate during any disciplinary procedure or other  
32 procedure adopted and used by the constituent institution regarding the alleged violation.  
33 However, a student organization shall not have the right to be represented by a licensed  
34 attorney or nonattorney advocate if the constituent institution has implemented a "Student  
35 Honor Court" which is fully staffed by students to address such violations.

36       (c) Nothing in this section shall be construed to create a right to be represented at a  
37 disciplinary proceeding at public expense."

38       **SECTION 6.(d)** Each constituent institution shall track the number and type of  
39 disciplinary proceedings impacted by this section, as well as the number of cases in which a  
40 student or student organization is represented by an attorney or nonattorney advocate. The  
41 constituent institutions shall report their findings to the Board of Governors of The University  
42 of North Carolina, and the Board of Governors shall submit a combined report to the Joint  
43 Legislative Education Oversight Committee and the House and Senate Education  
44 Appropriations Subcommittees by May 1, 2014.

45       **SECTION 6.(e)** Subsection (c) of this section is effective when it becomes law and  
46 applies to all allegations of violations beginning on or after that date.

47  
48 **AMEND PRIVATE CLUB DEFINITION**

49       **SECTION 7.** G.S. 130A-247 reads as rewritten:

50 **"§ 130A-247. Definitions.**

51       The following definitions shall apply throughout this Part:

## ATTACHMENT G

**Sixty-fourth Legislative Assembly of North Dakota  
In Regular Session Commencing Tuesday, January 6, 2015**

SENATE BILL NO. 2150  
(Senators Holmberg, Armstrong, Casper)  
(Representatives Delmore, M. Johnson, Larson)

AN ACT to create and enact a new section to chapter 15-10 of the North Dakota Century Code, relating to student and student organization disciplinary proceedings at institutions under the control of the state board of higher education; to provide for the development of a uniform policy; and to provide for a report to the legislative management.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1.** A new section to chapter 15-10 of the North Dakota Century Code is created and enacted as follows:

**Disciplinary proceedings - Right to counsel for students and organizations - Appeals.**

1. Any student enrolled at an institution under the control of the state board of higher education has the right to be represented, at the student's expense, by the student's choice of either an attorney or a nonattorney advocate, who may fully participate during any disciplinary proceeding or during any other procedure adopted and used by that institution to address an alleged violation of the institution's rules or policies. This right applies to both the student who has been accused of the alleged violation and to the student who is the accuser or victim. This right only applies if the disciplinary proceeding involves a violation that could result in a suspension or expulsion from the institution. This right does not apply to matters involving academic misconduct. Before the disciplinary proceeding is scheduled, the institution shall inform the students in writing of the students' rights under this section.
2. Any student organization officially recognized by an institution under the control of the state board of higher education has the right to be represented, at the student organization's expense, by the student organization's choice of either an attorney or nonattorney advocate, who may fully participate during any disciplinary proceeding or during any other procedure adopted and used by the institution to address an alleged violation of the institution's rules or policies. This right only applies if the disciplinary proceeding involves a violation that could result in the suspension or the removal of the student organization from the institution. This right applies to both the student organization that has been accused of the alleged violation and to the accuser or victim.
3.
  - a. Any student who is suspended or expelled from an institution under the control of the state board of higher education for a violation of the rules or policies of that institution and any student organization that is found to be in violation of the rules or policies of that institution must be afforded an opportunity to appeal the institution's initial decision to an institutional administrator or body that did not make the initial decision for a period of one year after receiving final notice of the institution's decision. The right to appeal the result of the institution's disciplinary proceeding also applies to the student who is the accuser or victim.
  - b. The right of the student or the student organization under subsection 1 or 2 to be represented, at the student's or the student organization's expense, by the student's or the student organization's choice of either an attorney or a nonattorney advocate, also applies to the appeal.
  - c. The issues that may be raised on appeal include new evidence, contradictory evidence, and evidence that the student or student organization was not afforded due process. The

institutional body considering the appeal may consider police reports, transcripts, and the outcome of any civil or criminal proceeding directly related to the appeal.

4. Upon consideration of the evidence, the institutional body considering the appeal may grant the appeal, deny the appeal, order a new hearing, or reduce or modify the suspension or expulsion. If the appeal results in the reversal of the decision or a lessening of the sanction, the institution may reimburse the student for any tuition and fees paid to the institution for the period of suspension or expulsion which had not been previously refunded.
5. For purposes of this section, "fully participate" includes the opportunity to make opening and closing statements, to examine and cross-examine witnesses, and to provide the accuser or accused with support, guidance, and advice. This section does not require an institution to use formal rules of evidence in institutional disciplinary proceedings. The institution, however, shall make good faith efforts to include relevant evidence and exclude evidence which is neither relevant or probative.
6. This section does not affect the obligation of an institution to provide equivalent rights to a student who is the accuser or victim in the disciplinary proceeding under this section, including equivalent opportunities to have others present during any institutional disciplinary proceeding, to not limit the choice of attorney or nonattorney advocate in any meeting or institutional disciplinary proceeding, and to provide simultaneous notification of the institution's procedures for the accused and the accuser or victim to appeal the result of the institutional disciplinary proceeding.

**SECTION 2. STATE BOARD OF HIGHER EDUCATION TO DEVELOP POLICY - REPORT TO LEGISLATIVE MANAGEMENT.** The state board of higher education shall develop and implement a procedure for student and student organization disciplinary proceedings which is applied uniformly to all institutions under the control of the state board of higher education. Before July 1, 2016, the state board of higher education shall report to the legislative management on the status of the implementation of the uniform procedure.

\_\_\_\_\_  
President of the Senate\_\_\_\_\_  
Speaker of the House\_\_\_\_\_  
Secretary of the Senate\_\_\_\_\_  
Chief Clerk of the House

This certifies that the within bill originated in the Senate of the Sixty-fourth Legislative Assembly of North Dakota and is known on the records of that body as Senate Bill No. 2150.

Senate Vote: Yeas 44 Nays 1 Absent 2

House Vote: Yeas 92 Nays 0 Absent 2

\_\_\_\_\_  
Secretary of the Senate

Received by the Governor at \_\_\_\_\_ M. on \_\_\_\_\_, 2015.

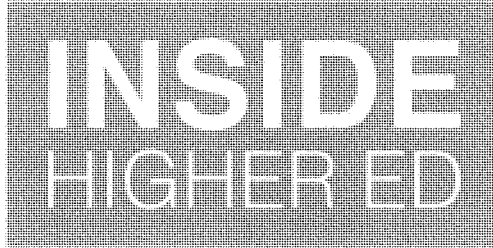
Approved at \_\_\_\_\_ M. on \_\_\_\_\_, 2015.

\_\_\_\_\_  
Governor

Filed in this office this \_\_\_\_\_ day of \_\_\_\_\_, 2015,  
at \_\_\_\_\_ o'clock \_\_\_\_\_ M.

\_\_\_\_\_  
Secretary of State

## ATTACHMENT H



### Making Title IX Work By Jake New July 6, 2015

NASHVILLE, Tenn. -- The intersection of campus police investigations and college disciplinary investigations into sexual assault is still a confusing mix at many institutions, but Susan Riseling, the chief of police and associate vice chancellor at the University of Wisconsin at Madison, has a few ideas about how make the relationship work.

Speaking at the annual meeting of the International Association of College Law Enforcement Administrators here on Wednesday, Riseling offered a number of suggestions to not only help campus police better meet the requirements of Title IX of the Education Amendments of 1972 and the Clery Act, but to use those requirements to help inform their own investigations.

Her presentation was based on two recent white papers about the topic, which were the result of two summits she helped organize over the last year studying the issue.

A common theme at the institutions the summits studied was a lack of communication between the various parties that are required by law to handle allegations of campus sexual assault. Not everyone on campus is required to report a sexual assault to police if a student comes to them for help, and colleges are required by the U.S. Department of Education to do their own investigation, separate from that of the police. Campus police officers -- who are in some cases both sworn law enforcement officers and members of a college's staff -- can find themselves straddling both kinds of investigations at once.

In states like Wisconsin, state laws and federal laws over who must report cases of sexual assault differ, creating more confusion. At the University of Wisconsin, there are 5 detectives with the campus police department, 20 counselors with health services and 10 staff members with the dean of students' office, all of whom are meant to be potential points of contact for students who have been sexually assaulted.

"We have to figure out how we're all going to tell each other," Riseling said. "We're all chasing our tails."

The channels available to students for reporting an assault should be easily found on a college's website -- no more than four clicks from the home page, the summits' working group concluded -- and every faculty and staff member on campus should be aware of whom they should report a sexual assault to. While staff members should help students learn about all the resources available to them, Riseling said, they should always encourage students to talk to the police.

Both campus police and Title IX investigators should all be familiar with research on how to interview trauma victims, Riseling said, getting basic details at first, but then returning to the specific questions over the next couple of days.

"All of us who have been in officer-involved shootings know that an officer is given one if not two cycles of sleeping before being interviewed," Riseling said. "We do that for cops. It's the same type of psychology for sexual assault victims."

Police must do a better job of interacting with victims of sexual assault in other ways, too, she said, and campuses should find ways to build up trust between students and police officers. She told the police chiefs in the audience to buy a copy of Jon Krakauer's book *Missoula*, and to require their officers to read it so that they can understand why sexual assault victims often distrust the legal system. The book details how the University of Montana and the city's prosecutors mishandled cases of sexual assault on campus.

"You could have cropped out Missoula, Montana, and put Madison, Wisconsin, in there," Riseling said.

The University of Wisconsin's police department has indeed made some missteps when interacting with students regarding sexual assault prevention. In October, a list of safety tips published on the department's blog was widely criticized for appearing to blame victims of campus crimes, especially victims of sexual assault. The post, renamed "Tools You Can Use," was originally titled "Shedding the Victim Persona: Staying Safe on Campus." That title, as well as a passage telling students to "make yourself a hard target" prompted a harsh backlash on blogs and social media.

Last year, the university launched a campaign designed to encourage more students to turn to police when they have been sexually assaulted. Called "You Can Tell Us," the campaign included a series of posters and a website telling students what resources were available to them and explaining that victims are never to blame and that they are "in control of the investigation." Riseling said the university hoped to increase reporting by 50 percent.

Instead, the number of reports to campus police increased by 400 percent, to 70 cases last year. By patiently interviewing victims in a way that acknowledged their trauma, she said, police were able to identify every alleged attacker in those cases. The district attorney moved forward with all but two of the cases.

Convincing district attorneys to prosecute more cases of campus sexual assault is crucial, Riseling said, and that can only be done if the cases are being investigated fully by trained police officers, not just Title IX investigators, who have to meet a much lower standard of evidence than a prosecutor would.

That doesn't mean detectives and Title IX investigators can't work together, however, she said, and it may be more comfortable for the victim if the two kinds of investigations are happening in tandem. Rather than interviewing the victim twice, Riseling said a Title IX investigator should watch the police's interview through a television feed, and prompt the detective to ask any additional questions.

She also described a case at Wisconsin, in which the Title IX investigation was the only reason police were able to arrest a student accused of raping his roommate's girlfriend.

The accused student denied the charges when interviewed by police, Riseling said. In his disciplinary hearing, however, he changed his story in an apparent attempt to receive a lesser punishment by admitting he regretted what had occurred. That version of events was “in direct conflict with what he told police,” Riseling said. Police subpoenaed the Title IX records of the hearing and were able to use that as evidence against the student. “It’s Title IX, not Miranda,” Riseling said. “Use what you can.”

Chairwoman FOXX. Thank you very much.

I would now like to recognize the chairman of the committee, Chairman Kline, for 5 minutes.

Mr. KLINE. Thank you, Madam Chair, and thanks for holding the hearing.

Thanks to all the witnesses for being here. Real experts and excellent testimony.

I picked up a theme, if I can use that term, when I was listening to both Ms. Scaduto and Dr. Rue, about complexity. Somebody, I think it was Dr. Rue, used the words “swirl of regulations” and a “patchwork of regulations.” And Ms. Scaduto, in her four recommendations, the one that is written and not—wasn’t oral has—says “harmonize standards, obligations, expectations under Title IX, VAWA, and Clery.”

It does seem to me that it is confusing because you have different statutes with different requirements, and I have great confidence that everybody in this room—sitting up here, sitting there, or sitting in the gallery, so to speak—wants to find a way to eliminate sexual assaults on campus, and should it occur, to make sure that we are holding perpetrators accountable and that we are providing support and protection for victims. But it does seem to be complex.

So I will just go to you, Ms. Scaduto, in part because I lived in the beautiful town of Carlisle for a while. It is a beautiful part of the country and of the state, and my son graduated from Carlisle High School. And so I have got this tie. I have just got to go to Carlisle. And it is Carlisle, not—anyway, it is a long story.

Are you concerned that the emphasis that is being placed, the focus that is being placed on complying with these different federal laws, regulations, and guidance is detracting from your ability to do what is in the best interest of your students?

Ms. SCADUTO. I apologize.

Yes, we are. I think it is a concern shared not only on Dickinson’s campus in Carlisle, but on campuses around the country.

If we were able to harmonize—and we understand that the promulgation of legislation and regulations is done with the best of intentions in protecting our students, and it is a goal we support. But when we are spending our time trying to harmonize our compliance with the various statutes, it takes away from where I think we as educators excel, and that is in educating. And that is on the side of prevention and training that Dr. Rue spoke so eloquently about.

When we have different reporting requirements, for example, under Clery and under the OCR guidance, who—we have the same group of employees who are interacting with the same students but we are getting different standards for who must report and what they must report when they learn of an incident of sexual misconduct. And when that type of analysis detracts from making—getting the report made and responding to a student in need, it is problematic.

There are ways to improve harmonization, such as the notice and comment period that could be used by OCR when it enacts new guidance, because even there are distinct differences between that and the VAWA regulations or the Clery regulations, for example.

So yes, the disharmony does present complications and takes us off the real important work we need to do around this issue.

Mr. KLINE. Thank you very much.

I yield back.

Chairwoman FOXX. Thank you, Mr. Chairman.

I now recognize the ranking member, Mr. Scott.

Mr. SCOTT. Thank you, Madam Chairman and Ranking Member Hinojosa, for calling this hearing on preventing and responding to sexual assault on college campuses.

This issue of campus safety is foremost in the minds of American families as they send their children away to college. Congress in 2009 declared September the National Campus Safety Awareness Month to help bring awareness to incidents of campus rape, mass shootings, and other forms of violence at educational institutions.

Twenty-five years ago, Congress passed the Clery Act to require institutions of higher learning to report campus crime statistics and to publish campus safety and security policies.

We know the issue of campus sexual assault is complex. Nevertheless, Title IX and the Clery Act require that once the school knows or reasonably should know of possible sexual violence it must take immediate and appropriate action to investigate or otherwise determine what occurred.

Unfortunately, campus sexual assault is usually addressed only after there is an alleged incident. We have to have meaningful procedures to hold accountable those who commit sexual assaults, but we also must do more to try to prevent them from occurring in the first place.

One strategy is to educate young people about healthy and safe relationships before entering college. The Teach Safe Relationships Act of 2015, introduced by Senator Tim Kaine of my home state of Virginia, would require that health education in public secondary schools include learning not just biology but also safe relationship behavior aimed at preventing sexual assault, domestic violence, and dating violence. Currently, federal law does not require health and sex education classes to include information regarding these relationships, which can prevent sexual assault.

There is also a study published in the June 2015 New England Journal of Medicine that found that college women who participated in an intensive program showing students how to recognize and resist sexual aggression reduced their chance of being raped by nearly 50 percent and attempted rape by 62 percent.

And we know that funding is also an issue, and funding is needed to implement educational programs and robust enforcement of all civil rights laws on campus. But the Department of Education's funding has decreased or been flat-lined over the years and the agency staffing level is the lowest it has been in 34 years despite having a record of nearly 10,000 civil rights complaints.

We can also do more to train campus public safety personnel, and support evidence-based research to strengthen college safety and security, and have a clearinghouse for dissemination of relevant campus public safety information. As an example, the National Center for Campus Public Safety in January 2015 conducted its first pilot program, offered in a course in Richmond, Virginia, to develop a trauma-informed sexual assault investigation and adjudication training for campus officials, including Title IX coordinators, advocates, legal counsel, and others.

Let me ask just a question to all of the witnesses. Some have alluded to some of the things we can do. Can the witnesses talk about—I know we are going to talk about what to do after the fact, but what kind of strategies can we do before the fact to actually reduce the incidence of campus sexual assault?

Ms. MAATZ. That is an excellent question, Mr. Scott. Thank you so much for asking it.

You know, working on relationships and students' understanding of safe relationships is key, and doing that before they get to college is also important. AAUW's research shows that sexual harassment and bullying is prevalent in K-12 schools starting really, quite frankly, with preschool. So having conversations about safe relationships, having good curriculum about how to talk about those issues, and also encouraging students to look at themselves as someone who can help, you know, to look at the bystander intervention kinds of models have been really successful.

The CDC studies have shown that when you really do relationship education and an emphasis on safe and healthy relationships you do start to erode campus sexual assault.

So you do need to start young. It needs to be consistent. It needs to be ongoing. And it is something that we need to get behind.

Mr. SCOTT. Are you familiar with Senator Kaine's bill?

Ms. MAATZ. I am familiar with Senator Kaine's bill.

Mr. SCOTT. Can you make a comment about it?

Ms. MAATZ. It is a bill that AAUW supports. I think it is smart to look at this kind of curriculum across the country.

And right now, since we know we have this epidemic of campus sexual assault, starting young is great. Doing it in high school is fine, but I also would submit you probably need to start in elementary school.

Ms. RUE. Let me just add briefly that the research is inconclusive because rarely do we have the opportunity to do random assignment of subject to group, which is where you can get really rigorous testing. So more support for research in this area would really be useful. We have what we know and what CDC calls "promising practices," but we don't actually have proven effectiveness.

Mr. SCOTT. Thank you, Madam Chair.

Chairwoman FOXX. Thank you very much, Mr. Scott.

Dr. Rue, you mentioned the importance of prevention and education efforts on the campus in reducing incidents of sexual assault. Do you have written evaluations that you can provide us on the results of those efforts? And could you give us just a thumbnail of the greatest—what have had the greatest impact on the campus safety climate, from what you have experienced?

Ms. RUE. Yes, ma'am. Thank you for the question.

The two most promising practices are bystander intervention training and social norms training.

In bystander intervention training, people learn the steps it takes to disrupt or interrupt what looks like it is going to be problematic behavior. The truth is peers are often able to do this, but they need the courage to essentially change the code, if you will, of what is agreed upon as appropriate social behavior.

And this has been effective. Again, we haven't had studies that have shown random assignment of subject to group so we call it a promising practice.

The other practice is the social norms practice, and what social norms does is look at the gap between what people think and what people think other people think. And it really contributes to things such as rape myth.

And so when you can ask, through research, "Does a woman drinking too much suggest that she wants to have sex?" you can actually measure that and you will find that people think other people think that but they don't think that themselves. And so you can go back to your campus with that gap and combat those norms that are actually creating a hostile environment.

Chairwoman FOXX. Thank you very much.

Mr. Cohn, in your testimony you make the important point that rape is a crime and should be treated as such. How could using what you call amateur systems on campus lead to injustice for both victims and accused students?

Mr. COHN. Thank you for the question, Chairwoman Foxx.

The primary way that—the way the status quo works harms both the accused students and the complainants is that we get unreliable findings because the people adjudicating cases don't have the right tools to do it. The same people who would be fine on juries are doing—you have deans of physics departments, English professors, and sophomores trying to figure out if a rape occurred.

And they are doing without forensic evidence, they are doing it without the subpoena power, without the ability to put witnesses under oath. They are doing it without rules of evidence to make sure that relevant information is included and irrelevant is excluded. The idea that they are going to get it right consistently with all of those limitations is a fantasy.

So the primary thing that we can do is make sure that we ask people to play a role that they are competent to fulfill, one that takes advantage of the skills and what they bring to the table, and work together. And that is what I mean when I say that amateurism affects injustices.

Chairwoman FOXX. Thank you very much.

Ms. Scaduto, you mentioned that you were a negotiator in the rule-making process for implementation for VAWA. Could you tell us a little bit more about that experience and how you believe the opportunity for stakeholders to contribute to the development of the regulations resulted in clearer and more transparent expectations for schools, especially in contrast to sub-regulatory guidance?

Ms. SCADUTO. Happy to do so, Chairwoman Foxx.

Through the negotiated rule-making there was a group of I believe 14—28 with our alternates, who were very much a part of the process—and we represented divergent points of views, every view, however, being equally committed to dealing with the issue of sexual violence.

We had higher education administrators, like Dr. Rue, at the table; we had counsel, like me; we had security officers from higher ed; we had survivors and victims of rape, male and female both represented; we had advocacy groups at the table. And we did very hard work.

We came together over a 3-month period and we looked at proposed language proffered by the Department of Education, and we had the opportunity to talk about whether we should drill down in a particular area and impose a single standard on a particular issue and talk about, as Dr. Rue mentioned earlier, the fact that we need language which is fluid because colleges and universities are so different across this country: large, small, public, private, on-line, commuter—all those different issues.

And it was very difficult work, but I am confident that the product we ended up with at the end of that process was a better reflection of the wider community in rules and regulations that work on college campuses than without it.

Chairwoman FOXX. Thank you very much.

Mr. Hinojosa, I recognize you for 5 minutes.

Mr. HINOJOSA. Thank you.

My first question is to Ms. Lisa Maatz.

You state in your statement that you read to us that current law requires schools to respond to campus sexual assault because a student's civil rights are on the line. You also said that a school's civil rights investigation and any law enforcement criminal investigation represent parallel and equally necessary paths.

Can you please explain the parallel tracks of Title IX enforcement interact as compared with criminal investigations? And why is it so important for the victim to be able to decide whether he or she wants to pursue a criminal investigation as opposed to campus disciplinary process?

Ms. MAATZ. Well, I think—thank you very much for the question. I think there is great confusion between what a criminal process looks like and what the civil rights process on a college campus is supposed to look like.

College campuses are not supposed to be nor would we expect them to be enforcing criminal law. What they are doing is looking at civil rights: Has Title IX been violated? Has a woman in this case been—has her education been impacted and therefore she can't, obviously, take advantage of her civil right to a sex discrimination-free education?

So it is really in that sense—they are parallel tracks, but they are very different. Schools can't send people to jail. You know, schools really look at enforcing student code of conduct.

And, you know, before when we were talking about the notion of kind of amateur courts, I do take exception to that in many respects on behalf of schools, because they have been dealing with - and enforcing their student code of conduct for decades, in some issues for hundreds of years. So the reality is, they know how to do that.

Where there is confusion, I think, is that when it comes to campus sexual assault, schools are supposed to be dealing with the civil rights impact not just on that individual student but how it impacts the campus as a whole, and that is different than the criminal proceedings that we have talked about.

Mr. HINOJOSA. Thank you.

Ms. Dana Scaduto, you said that colleges and universities are very concerned that despite their best efforts to follow applicable laws and guidance, achieving full compliance is not possible. And

you also said proposing—creating safe harbors where colleges are not held liable under Title IX if they can show good-faith efforts to meet the requirements of conflicting provisions.

Can you help me understand how creating such a safe haven would reduce and help prevent instances of campus sexual assault?

Ms. SCADUTO. Certainly, Mr. Hinojosa. It is my privilege to do so.

Let's take the example—there are a couple of examples I can give you. If you take the OCR guidance, in it we are supposed to advise a victim of her right to report. Clery uses the language that we have to advise the victim of her right not to report.

Is there an intended difference between those? And when you put those—you take that and you put it up against a state law, where, if you take Clery and you have to advise an individual of her right not to report but there is a state law that mandates reporting of felonies by the institution, have we created a conflict between—in executing on a plan that everyone wants the same outcome but we have this swirl of differences and we are not quite sure how to comply with all of them?

And in our best efforts to do so, if we err by reporting under the state law when we have Clery telling us we have to report—advise a woman of her right—or a victim of her right not to report, provide us with protection and support that if, in our best efforts to comply, we miss the mark, that we won't be held accountable for penalties or agency action. That is just one example.

Mr. HINOJOSA. Thank you.

Mr. Cohn, time is running out and as I heard your presentation, brought back memories of what is approximately 20 years of service on this committee. Congresswoman Patsy Mink, from Hawaii, led a group of members of Congress to focus on Title IX and there was a mindset throughout the country, especially from some certain states, that wanted—that Title IX removed or weakened so that it wouldn't be a problem for them, their mindset that women were not supposed to have the same opportunities in sports.

Now that we are dealing with this, you talk about allowing schools to set a higher burden of proof in these proceedings could make it more difficult to punish offenders. How does that contribute to making campuses safer?

Mr. COHN. Thank you, Congressman Hinojosa, for the question.

I think reliability in outcomes makes campuses safer. And when you reduce the amount of certainty that fact-finders need to hold without providing them the tools to reach the fact-finding in the first place, you are not really making campuses safer.

At the end of the day, don't forget, someone who has been expelled from a campus is not removed from society. They are still free to walk the streets. The campus isn't actually safer either, even with the expulsion.

The truth of the matter is that schools need to not be indifferent to claims, need to make sure that they can provide the kind of services necessary to make sure that complainants can get an education the next day. And that isn't tied necessary to being a fact-finder.

Mr. HINOJOSA. Well, I want to go on record that I disagree with you because the list of universities throughout the country with

violations that are under investigation right now has doubled, tripled, and quadrupled. So I think that we really in the Congress need to address this, and be very, very strong—

Chairwoman FOXX. The ranking member's time has expired.

Mr. HINOJOSA. I yield back.

Chairwoman FOXX. Dr. Roe, you are recognized.

Mr. ROE. Thank you.

And thank you, for the panel. This is an incredibly complicated, difficult situation, and I think probably I am the only one sitting on the dais, except perhaps Dr. Heck, who has examined women for sexual assault and has testified in court. It is my lifelong job as an obstetrician/gynecologist. It is an incredibly difficult, complicated issue you all are dealing with.

And, Ms. Scaduto, you brought out a couple of points that hit me. Requirements we have from the state—if I examine a woman in the emergency room, I break state law if I don't report that if this is a student, and they are in conflict. And I think it puts a great pressure, I mean, on you to know if you are doing the right thing.

And I know that—and I am going to ask Mr. Cohn in a minute about this—we certainly want to protect the rights of each one, but I can tell you, I have dealt with patients over decades who have dealt with the consequences of sexual assault, and how you deal with it and—I mean, it changes—it is life-changing, and I mean forever life-changing. So how you deal with this is incredibly important, and I think the start you all made is that early on is education is absolutely the key to prevention.

And I know, Dr. Rue, you mentioned a couple of things that really intrigued me about how you prevent that. And the results in—I mean, the incidence is lowered greatly.

I don't know whether the incidence is greater now or just the reporting is greater. I have a feeling it is just the reporting is greater. I think the crime has been there all along, and I think it just has been grossly underreported.

So a couple things that I would like to know is—and I will start, Mr. Cohn, with you, is that you are absolutely right. To gather this information—I have done it meticulously before—is very difficult to do to protect the rights of everybody involved.

And I know, Ms. Maatz, you mentioned we are dealing with a civil rights issue and a criminal issue.

When does a school—when do you determine to turn this over to the police as a criminal—because it is a criminal act?

Mr. COHN. Well, I think that is really one of the key questions in this debate is what is the appropriate role of law enforcement here? And I am glad you zoned in on it.

At the end of the day, mandatory reporting doesn't require a complainant to cooperate with an investigation. It does, however, require that the law enforcement is aware of it so they can at least reach out and offer the services they provide.

One thing that we know—and it is a fact—is that you have only 72 hours to get a rape kit done; you have only 48 hours to get blood collected that can show whether someone was drugged against their will or perhaps if they were so intoxicated they couldn't possibly have consented. Once that timeframe is elapsed, it is—the window is gone to have that physical evidence help a claim.

FIRE primarily believes that everyone will be helped by getting the right professionals plugged in as quickly as possible. That is the way to build trust with the—with law enforcement is to make sure that they get the information as fast as possible when they can take the best and strongest actions on behalf of victims.

It will also help the falsely accused to have information recorded quickly, too. It will help everyone.

Mr. ROE. Of course, we have seen over time where with new DNA evidence and new evidentiary things we have had that—where people have been falsely accused, and obviously you want due process for everybody.

Dr. Rue, to you, at Wake Forest University, what resources do you have for a student, either male or female, after this has occurred? Because I can tell you, as a physician it is absolutely critical.

Ms. RUE. Thank you for your question, Representative Roe.

I agree with you that it is a life-changing event. I have sat with many, many students in that process, both men and women, quite honestly, and it is devastating.

We do have 24/7 on-call confidential advisors that are available to go wherever the student is, if the student is in the emergency room or if the student has gone to student health. We have 24/7 student health and we have 24/7 student EMTs on campus, and so we have got a nice safety net right there.

The most critical link is our confidential advisor. This is the person that reaches out and establishes trust.

If the first questions someone is asked by their friends are about their own behavior they are likely to completely shut down. And so if we can get that person as fast as possible to our confidential advisor, who is trauma-informed in her counseling techniques and who can create that bond, and then accompany her or him throughout whatever processes, whether it be sitting through a police investigation, whether it be going to the housing department to make room changes or to the academic advisor. And that bond is the most important bond, and it is the most important role on campuses today.

Mr. ROE. My time is expired, but one other thing that I want to—you all to think about is how can we streamline this so that you are not checking boxes but taking care of students. That is where the resources need to be.

And I see it all the time where you—all this confab of things you have to do takes away from the real—which is taking care of the student and the patient.

I yield back.

Ms. RUE. I appreciate your commitment.

Chairwoman FOXX. Thank you, Dr. Roe.

Dr. Adams, I would like to recognize you for 5 minutes.

Ms. ADAMS. Thank you very much, Chairman Foxx, Ranking Member Hinojosa, for holding this important meeting.

My thanks, also, to the witnesses for your testimony, and special shout-out to Dr. Rue, from Wake Forest, which is partially in my district.

Campus sexual assault is a very serious issue. It affects entirely too many of our students. And to be clear, even one student is too many.

And so while I believe prevention through education is the best way to combat this growing problem, and I appreciate your speaking to that, we must still deal with the incidents that occur. Unfortunately, that is nearly impossible to do with all the differing ways in which institutions of higher education and law enforcement agencies handle sexual assault, and it is becoming more complicated with efforts to weaken Title IX.

Although North Carolina has—does not have a significant number of incidents currently open, the case open at the University of North Carolina Chapel Hill is particularly disturbing, and I am disappointed that there is a case that is open in my city of Greensboro, at the University of—at Guilford College.

I spent 40 years as a faculty member on the campus, Bennett College, a small women's college, primarily African-American women, in Greensboro, and I had ongoing concerns then and I still do. And there are many things that I could talk about surrounding sexual assault, but I want to hone in just for a moment on the effects of women of color.

According to the Centers for Disease Control, approximately 34 percent of multi-racial women, 27 percent of Alaskan Native American Indian women, and 22 percent of black women, and 14.6 percent of Hispanic women are survivors of sexual violence.

Ms. Scaduto and Dr. Rue, both Dickinson College and Wake Forest University are liberal arts institutions with pretty good resources, I think. Can each of you speak to your campus initiatives that address the need for cultural-specific prevention education for your minority students who might be dealing with the weight of other issues, like racial discrimination and economic disparities?

Ms. RUE. Yes. Thank you, Representative Adams. I appreciate your question.

We do take our responsibilities to all students very seriously and we know one size doesn't fit all. With our African-American students, we have a peer mentoring program that creates a very tight-knit bond with well-resourced upper-class students.

And we have an increasing number of first-generation students—students whose parents didn't attend college. And we have the First in the Forest program that really helps those students navigate, as well.

We do try to utilize the best research to understand differential impact and also to get within the peer culture, because that is where these things occur. So the use of peer educators is our most important tool.

Ms. SCADUTO. All I can say is the programs at Dickinson are similar. We have specialized training for African-American men in healthy choices and healthy habits, called MANDatory. We do many of the same things that Dr. Rue is doing.

There is no question but that we can do more in cultural-specific impact, but right now we are putting in place—the issue is so prevalent that right now the issue is getting all of our students trained. It is using things like Green Dot and healthy relationships and sexuality training on our campuses for all students.

And I do imagine that as time passes we will become more proficient at looking at specific communities and how they are impacted.

Ms. ADAMS. Thank you both.

Ms. Maatz, within the same vein, do you have any recommendations for the best way to ensure historically black colleges and universities who have less resources, less staff, are able to provide comprehensive prevention and response?

Ms. MAATZ. Well, number one, I would always encourage colleges and universities to not reinvent the wheel. There are local community services often—rape crisis hotlines, domestic violence shelters—that can help with prevention programs and potentially being these confidential advisors, which is a great best practice.

The other thing I would say, though, specific to women of color is that we need to be really sensitive especially about mandatory reporting. We know that there are issues in terms of gender bias in policing and racial bias in policing, and for women of color, to mandate that they report to law enforcement is a great way to ensure that they don't report to anybody, that they don't get any help, that they don't get any support.

So we need to be culturally competent about that and sensitive, and I think that it is one of the reasons, quite frankly AAUW has sent a letter to the Department of Justice asking them to create new guidance in gender bias in policing to deal with some of the different things that women of color are facing.

Ms. ADAMS. Thank you very much. I am out of time.

Madam Chair, thanks very much.

Chairwoman FOXX. Thank you, Dr. Adams.

Mr. Guthrie, you are recognized for 5 minutes.

Mr. GUTHRIE. Thank you all for being here. I appreciate it. It is important for us to move forward on this as we work on higher ed reform.

I am in this situation. I had a daughter just graduate from college, but I have a son in college and before I came here was planning our college tour for my senior in high school, my little girl, and so when we leave—drop them off those days that crush us all; we leave them on campus and drive away.

We want to make sure that we are doing everything we can here and you are doing everything you can to make sure they are in a safe place. And so this information is going to be good for us.

And you look at, like, harmonizing requirements. I have learned—I was in state senate and now here—that when there is a requirement added or things done it is because something happened. And so we are reacting to something that happened and trying to prevent it in moving forward, and sometimes you get different bills that happen at different times and so you get different requirements.

And it should be an opportunity for us all to sit down during the higher ed reform and say, "What is this report trying to accomplish and what is it trying to prevent, and how can we harmonize them and do them together?" So that is important to do.

And, Ms. Scaduto, you talked in your written testimony, I believe, about some of the requirements that are established by the

administration that don't necessarily—or it is difficult to work around—with nontraditional campuses, nontraditional students.

Would you care to elaborate on that and talk about how that is difficult too? We need a system to take care of that, but we want to see how the particular requirements make it difficult to comply.

Ms. SCADUTO. Higher education would greatly appreciate frameworks rather than one—it goes to what Dr. Rue said earlier, one-size-fits-all. Let's take, for example, the differences in how—in training or education of different constituencies on various campuses.

Let's just take, for example, if it were determined by good research that having students in a chair to receive training on sexual—on violence prevention is the best method, but you are a commuter campus, you are a community college, or your students don't live there, you don't have the opportunities to reach them outside the classroom, as you do on a residential campus. If you are an online school—and there was an online school represented in negotiated rule-making, and her perspective kept popping up, and I have to admit, I was like, "Oh, I hadn't thought about that."

We need standards for reaching them with—rather than a—other than bright-line test. Even the question of what is a student. If you are an—if a student is taking one class as an adult learner who is taking one class, is that part of the cohort that raises the risk of sexual violence on your campus, or is it the 18-to 22-year-olds who live in residence?

These are all complexities about the differences in who we are as institutions and how we most effectively reach those who need the information. If we are going to engage in cultural change and cultural shift, we have to have the flexibility on the various campuses across this country to reach those different audiences in different ways.

Mr. GUTHRIE. And, Dr. Rue, I was going to ask you to elaborate more on your prevention, because that is where we are—want this—we would love to—we want to get to zero. We know we have to have systems because we are not at zero, but elaborate on your preventions that you were—you mentioned earlier, and then the ones that you think are most effective to students.

Ms. RUE. Right. I am going to turn to some work done by the Centers for Disease Control on this, and they have nine principles of effective sexual misconduct prevention programs.

The first is that it is comprehensive—it is multiple methods, not a one-shot deal, with varied teaching strategies. We know that people learn differently. Some learn through active engagement, others learn more theoretically, others more visually.

Sufficient dosage; opportunity over time to deal with these issues; theory-driven, they have a foundation in theory; that they foster positive relationships—they are not focused on what not to do, but instead, what to do; that their time to developmentally appropriately—if you are just getting ready to graduate versus if you are just arriving, those developmental needs are different; that they are socially, culturally relevant, as Representative Adams has suggested, that we understand the different backgrounds that students bring to us; and that there is an outcome evaluation as well as well-trained staff.

So those are—that is what the CDC had—has. We strive for all of those.

I will say that without getting into the curriculum it is difficult to deliver over long periods of time. We are usually working within a voluntary workshop format for students in our prevention programs. So I would say curricular innovations in this area would be very welcome.

Mr. GUTHRIE. Thanks.

And I will just conclude with the day that you drop them off and you drive off campus, you are—like I said, you are crushed because you are—they are leaving home; but you leave them, I mean, you are also excited for them, and you want them to have the experience of a lifetime, and you want it to be safe and secure. So thank you so much for that.

And I yield back.

Chairwoman FOXX. Thank you, Mr. Guthrie.

Mrs. Davis, you are recognized for 5 minutes.

Mrs. DAVIS. Thank you, Madam Chair.

And thank you all for being here today. I appreciate that.

You know, we—before I—we dealt with a lot of campus issues around sexual violence—and I understand that we have been—campuses have been dealing with them for many years, but in terms of the visibility and the issue, it followed, to a certain extent, looking at sexual assault in the military. And we introduced a number of bills to try and get at this issue. Not so easy, and I have a few colleagues here from the Armed Services Committee that know and understand that.

One of the things that we have been talking about here, which was really critical, was the support for victims, men and women, to have access to—you mentioned a trauma-informed, but a highly professional individual who really can help victims navigate the system and provide the kind of options available to them that they have, whether it is, you know, reporting or non-reporting and what that means, actually, for them.

So I was just wondering, in terms of what you have seen in the Campus—the Safe Campus Act or other acts, are there some that you think actually would make it difficult for a student who chooses not to report to have those services—to receive those services? Are there bills that actually do tie the opportunity for victims to be informed by someone who really is highly trained in this area?

And quite frankly, I am not sure that we are there yet, in terms of the “highly trained,” but at least we know where we have to go with it.

Anybody want to—do you see that? Are we—

Mr. COHN. If I can respond real quickly, Congresswoman. The Safe Campus Act has its mandatory reporting provision that would limit a campus’ response if a student doesn’t choose to report, and FIRE has urged Congress to amend that provision to leave all of the non-punitive measures still on the tables—the ones that you identified that shouldn’t hinge on that student’s decision.

But we do think it is generally a good idea to have campuses make sure that police are investigating. So we think it is a good idea to limit the punitive responses the school can make.

Mrs. DAVIS. Yes.

Ms. RUE. I am going to respectfully disagree—

Mrs. DAVIS. But, Dr. Rue, yes—

Ms. RUE. Yes.

Mrs. DAVIS.—Rue?

Ms. RUE. We know that, again, that ability to navigate to that confidential victim support person is the most critical thing. And if universities are mandated to report criminally, we know it is going to have a chilling effect on people even getting to the very first resource to help.

The truth is, people do—most students do not want to go through a law enforcement interview. Our experience teaches us that cops look for violence, for signs of struggle for weapons; they don't understand the nuance of campus sexual assault; they tend to minimize—if you have read the book “Missoula” it provides a beautiful picture of what happens when individuals report in that setting: the kinds of questions they are asked, the kind of doubt that is cast upon them. And again, it has a chilling effect and it causes many to shut down, so I can't support it.

Mrs. DAVIS. And, Ms. Maatz, I—and addressing, as well, the harmonizing issue that we—that we mentioned earlier in terms of how universities, how institutions deal with this.

Ms. MAATZ. Well, I think the mandatory reporting absolutely has a chilling effect. I think if you are looking for a way to not have students report not only just to the school, but also to law enforcement, make it mandatory.

Part of what we are trying to do with Title IX and the Clery Act is create an environment on campus that supports reporting. If it is going to be supportive to students, it needs to actually be helpful to them. And that kind of reporting not only helps that individual student but sets the tone on campus, in terms of creating a safe—

Mrs. DAVIS. I think what is important about that, as well, and the SOS Act that I have authored along with Senator Boxer basically has, I think, actually brought about a number of special advocates on campuses in 30—in the University of California system and others, and I think you have mentioned many schools have them.

Ms. MAATZ. Thank you for that.

Mrs. DAVIS. I think the real key is the level of training that they have.

But more than that, I think what we have seen in the military system, as well, is the fact that people generally become more knowledgeable about this process, which has been a very well-kept secret in the past and is—I think has contributed to the fact that it is a fearful system, and that is what we are trying to get away from.

Ms. RUE. And thanks to your work on the military, our ROTC programs are among our best partners now. They are part of our sexual misconduct working group, helping in lockstep with their training resources, and it is a great partnership.

Mrs. DAVIS. Thank you.

Thank you, Madam Chair.

Chairwoman FOXX. Thank you very much, Mrs. Davis.

Dr. Heck, you are recognized for 5 minutes.

Mr. HECK. Thank you, Madam Chair.

I thank you all for being here and discussing this critically important topic.

Like my colleague, the gentlelady from California, I too was struck by what I thought was a lot of similarities between what you are experiencing on campuses and what we are experiencing within the military, which in and of itself is experiencing an epidemic of military sexual assault.

And, both Dr. Rue and Ms. Scaduto, in your comments you talked about things that are very similar: not straightforward or easy to resolve; do not involve force or attacks by strangers but between individuals who are acquainted; questions about effective consent; word-on-word conflicts may not be reported for days, weeks, months; and where the survivor has the right to choose a path within the wake of an incident, some reporting on campus or some to law enforcement, similar to the military restricted and unrestricted reports, where in a restricted report it is not referred to law enforcement but allows the victim to partake of the supportive services necessary to help them heal.

Question I have is, one, amongst anybody, has there been any review of what perhaps might be best practices developed within the military, realizing that we are not fully there yet either, but any best practices that might have been implemented in the military's response to this epidemic of sexual assault that may have application into what is being done on campuses?

Ms. RUE. I would have to say I need to learn more about what they have done, and I am eager to do so. Thank you for that referral.

Ms. MAATZ. I think, Dr. Heck, one of the things that I would say is that we have seen an increase in the reporting in the military, and part of the reason for that is because the conversation is being had, because there is now a top-down as well as a bottom-up kind of conversation being had; and there is training going on, and that makes all the difference in the world. The prevention is key, and I think those are all good lessons that we can use for campus sexual assault.

Mr. HECK. Thank you.

Mr. COHN. I don't know enough about the military practice to weigh in on there. What I can say is that one interesting parallel is that last year we heard a lot of chatter about how the military tribunals should not be adjudicating these matters because of the potential for bias there and that instead it should be removed to civil courts—essentially the same argument I have been making to you today, which is that campuses maybe shouldn't be adjudicating the facts because of the potential for bias and conflicts of interest instead, and that we should be relying on professionals and courts.

Mr. HECK. Thank you.

A question for my own edification: So if a victim on a campus chooses not to report to law enforcement but comes to the campus authorities to receive the supportive services, does that automatically then result in that case going forward for a disciplinary hearing on a college campus?

Ms. SCADUTO. No, it does not. It is a very insightful question.

The best guidance we get on dealing effectively with survivors of sexual assault tells us that they need the control to decide how to

go—if they want to go forward, when they want to go forward, and how they want to go forward. Although the guidance is inconsistent, we get guidance both from OCR and under the VAWA regs about—that mandate that we give them their options and tell them.

And it is funny, as I have listened to the conversation from Congresswoman Davis and others about the use of report, it is banging around in my head because we use report very specifically on campuses, and a report means someone coming forward and telling someone. That is a report, and that is it at its essence.

And if they do that then we wrap our arms around them as a community and make sure that they get the resources they want, they know their options, and if they want confidential reporting, we can direct them in that.

But if they come to us and they tell us, that report does not move forward under most circumstances—whether it is internally through our conduct processes, or externally through law enforcement, or both—without their consent and participation. There are exceptions, as you can expect. I mean, you are lawmakers; you know there are exceptions.

If we have an ongoing threat to our community we might have to move forward without the consent of the person who brought the report forward, and that also is an example of why safe harbors are important. If we are being guided by the wishes of the victim but we have an ongoing threat on our campus and we make that decision to move forward, being protected from action by administrative agencies would be helpful.

Mr. HECK. Great. So as a father of three, one who—a daughter who is a graduate of college, a daughter who is a junior, and a son who just started his freshman year, I thank you all for what you are doing to try—trying to make our campuses a safer place.

Thank you, Madam Chair. I yield back.

Chairwoman FOXX. Thank you, Dr. Heck.

Mr. DeSaulnier, you are next.

Mr. DESAULNIER. Thank you, Madam Chair. And I do want to say, consistent with some of my colleagues, first of all, thank you for having the hearing. I think the hearing helps to draw attention to what is, I feel, is of real urgency, and I think everyone else does. I hear a great commonality, in terms of our desire to take effective action, and we are struggling what that is.

And also, as a parent who has dropped two kids off at college, the rite of passage that all of us have shared and the conveyance of that trust that we put in the institutions that we leave them at, and the expectation that these wonderful institutions will not just education them well but provide a culture where they feel safe and that they aren't put in the situation of either being a victim or a bystander.

So my analogy—and I appreciate the last two comments about the analogy to the military—a lot of this conversation reminds me of the early 1990s when I was in local government and the Clinton administration was bringing up domestic violence. And a lot of the conversations we have had remind me very specifically of the challenges. And even though everybody wanted to stop it, we have got

to be careful of our approaches because we are all subject to subjective opinions about the relationships between men and women.

So, to Ms. Maatz, or maybe Dr. Rue or anyone else, CDC, when they look at the history of, for instance, domestic violence—and no analogy is perfect; I understand they are—but we know a lot now from the 20 years since 1994, when the Federal Government took a leadership role and passed the Violence Against Women Act that was just recently reauthorized. So not dissimilar, certainly.

And I remember talking to mandated reporters then, particularly educators in high school, who struggled with many of the same issues that you do, although because they were in the community I think they didn't have some of the—maybe the cultural or professional insular—not insular; that is a poor choice of words. Maybe you understand what I am getting at—the uniqueness of academia at a college campus.

Ms. MAATZ. Right. Congressman, I share your sense of a flashback in many respects. When I was the executive director of Turning Point, which is a domestic violence shelter and program in Ohio, it was during the O.J. Simpson trial; it was during the first efforts to pass the Violence Against Women Act. And so it felt like there was kind of a national teach-in on domestic violence and people were talking about it.

And I see that bright spotlight today on campus sexual assault. I think many of the same things are happening. It is being very much driven by survivors and advocates who feel the time has come. And I think that also is very similar.

I think we can take some lessons from that. We have a lot more data. After 20 years of the Violence Against Women Act, we have a lot more data about how violence occurs; we have police—law enforcement that are a lot more—have a lot more data and a lot more experience in dealing with it, prosecutors as well.

But I also would continue to stress that when we are talking about campus sexual assault we want to be mindful of the fact that we are dealing with that as a civil rights issue and that we need to be really concerned about the access to an education that does not contain sex discrimination. We know too often that survivors will have problems.

Oftentimes they will drop out. That obviously is an interference with their education. Some of them, because of some of the post-traumatic stress and other issues that they have had, their grades go down, and then they lose their scholarships, and then they are the ones who aren't on campus.

So it is something that we need to be mindful of. There is the criminal element that we need to talk about and need to harmonize, but at the same time, they are separate and distinct and equally necessary paths.

Mr. DESAULNIER. And I appreciate that.

I will let Dr. Rue respond, as well, because you were relating to my initial comments.

But we know from domestic violence and we know, as your comments said, of the causality and the multigenerational aspects of this. So the sooner we get the regulations right, the better.

And I would opine, based on that history and others, that the Federal Government does have an appropriate role in it. Making sure that role is effective I think is what we are all talking about.

Doctor?

Ms. RUE. I appreciate the earlier representative who brought up the issue of earlier education. We sadly know through our incoming student surveys that students have already been in abusive relationships. They have already had relationships that were controlling, that left them with self-doubt and unable to stand up for themselves.

So we do support—and we do understand these as multigenerational issues. If students don't have excellent role models to look to, where do we find that?

So we would love Department of Education to engage the K–12 system in these conversations, as well.

Mr. DESAULNIER. Thank you.

Thank you, Madam Chair.

Chairwoman FOXX. Thank you.

Mr. Salmon, you are recognized for 5 minutes.

Mr. SALMON. Thank you.

My first question is, is there any data out there that we can access that would deal with a victim that has initially chosen not to report to law enforcement who later regrets that and decides they want to report it to law enforcement and they want the individual prosecuted? Is there any data on that?

Mr. COHN. Congressman Salmon, interestingly enough, there is an absence of that data. We don't know, when a prosecutor chooses not to bring a case forward, why they made that decision all the time. Sometimes it could be because of outdated modes of thinking about women and stereotypes, but other times it could be because of spoliation of evidence.

We simply don't track that, and that is a major concern. And that is one of the reasons why we think it is so important to get the right medical and—

Mr. SALMON. Well, and I guess that is one of my big concerns. I was talking to Dr. Roe, who has dealt with a lot of victims and had to examine them and deal with them and court proceedings, and a lot of times later on an individual who decides they don't want that person prosecuted decides they do. And I have these concerns about going to the university or the college, and maybe the counselor or advisor leaning on them, maybe talking them out of prosecuting because of concern for the alleged perpetrator's career or education.

Whatever the case may be, I worry about the fact that an individual who decides initially not to prosecute or not to report to the law enforcement, all the forensics is lost and then several months later or several years later they decide, still within the statute of limitations, "I want that individual prosecuted so they are not going to do that to anybody else," and then the forensics is not there because it was never reported to law enforcement and the people that ended up dealing with it didn't have the capability to even put a case together in the first place.

Mr. COHN. One other critical aspect of mandatory reporting is that there is no way to build up more trust with police than to

work with them. You know, we can't fix a problem—if there is a problem in the criminal justice system it needs to be tackled directly with the criminal justice system.

If we are concerned about the chilling effect of having a police officer pick up the phone and say to them, "I heard about your complaint. Is there something I can do to help?" we will never get beyond the barrier of improving that system. They can only do that through working together with trust.

And hopefully you will get more prosecutions and more convictions, you know, if law enforcement is brought in faster.

Mr. SALMON. Well, it seems to me that the dialogue here today has been much more a focus on helping the victim cope and deal, and that is all incredibly important, and to deal with the aftermath and go forward. But I don't hear a lot of dialogue about justice.

Mr. COHN. But that is—

Mr. SALMON. I don't hear a lot of dialogue about keeping evil perpetrators off the streets so they don't do it to another girl. I mean, I have two girls that have graduated from college too, and I would be livid if some perpetrator who has sexually abused numerous girls and they all decided not to report, and that kid is still out there, you know, seeking to harm other girls and my girl ends up getting harmed, I am going to be pretty ticked off that guy is allowed to keep perpetrating these crimes.

Mr. COHN. Right. And I think one other thing needs to be said here about justice.

People keep saying that this isn't a criminal justice issue and that the panel isn't going to send someone to jail. That is only partially true.

The dean isn't going to sentence someone to 20 years in jail. That is true. But what is important for you to all hear as well is that the transcripts of the hearings are admissible in criminal trials and have been admitted across the country.

A prosecutor can independently decide if they want to click "print" and use everything that was said against an accused student. There are tremendous Fifth Amendment considerations here, so justice really requires meaningful due process, which I am so glad is part of the conversation—

Mr. SALMON. Can I just interject, because that was one of my other questions. Talk a lot about due process, and that is a fundamental right here in the United States for anybody that is accused of crimes. Can you tell me the difference between "preponderance of evidence" and "beyond a reasonable doubt"?

Mr. COHN. Sure. The criminal justice system used—

Mr. SALMON. Because that is very fundamental.

Mr. COHN.—"beyond a reasonable doubt," which is almost near—you know, near certainty. "Preponderance of the evidence" is 50.01 percent certainty that something was more likely to have happened than not. The difference between being 50.01 percent certain and 49.9 is so minimal it really amounts to just which hunch you believe more.

That is not a problem in civil courts, where there are all of the procedural protections that go into play—discovery, lawyers, rules of evidence, subpoena power, all of those things. But when you ask people without those other tools to then just decide who you agree

with more, that is where you get an injustice. It is when you decouple preponderance from all of the other protections.

Ms. RUE. I am going to have to disagree with that. Quite honestly, preponderance is the standard that precludes giving presumption for or against either party. It is the most equitable. Any other standard has already tipped the scale on who to believe.

Ms. MAATZ. It is not only the most equitable; it is also the standard that most schools have been using throughout the years so that it is not new or different.

The other part of the preponderance standard is that it is what is used when we are talking about, for instance, Title VII cases, civil cases that are dealing with these kinds of issues, which both have a civil remedy and maybe also could have some criminal implications. So the reality is this is something that schools understand, that they have been using for a long time, and that there is plenty of guidance from the Department of Education as to exactly how they should be using it.

Everything is about being equitable, being fair, and being impartial.

Chairwoman FOXX. Mr. Salmon's time has expired.

Mr. Jeffries, you are recognized for 5 minutes.

Mr. JEFFRIES. Well, thank you, Madam Chair.

I thank the distinguished ranking member, as well, for his leadership, and all of the witnesses for your presence here today on such an important topic.

I want to start my questioning with Mr. Cohn.

So it is my understanding you advocate for weakening the Title IX process in the context of investigating campus sexual assault. Is that accurate?

Mr. COHN. No. I mean, I wouldn't characterize it as weakening Title IX at all. There are so many things that schools should be doing morally and legally under Title IX to make sure that campuses are safe places. Fact-finding just is not really one of the things they are equipped to do well.

Mr. JEFFRIES. Okay. But the Title IX process provides for campus adjudications, but you contend that those adjudications are ill-equipped and therefore that should be abandoned. Is that a fair characterization of your position?

Mr. COHN. I think that would be a fair characterization. There is a long track record of the injustices against both accused and complainants when amateurs are handling these matters.

Mr. JEFFRIES. And you have a greater degree of confidence in law enforcement and the criminal justice system to handle these—

Mr. COHN. Right.

Mr. JEFFRIES.—issues. Is that true?

Mr. COHN. So there is no doubt that the criminal justice system is imperfect, but that is a persuasive argument for trying to fix and improve that. I have greater confidence in that system because it provides real tools and the actual structures that make sure that everyone's rights are taken into account.

And that is so important because I want them to get it right. I want to make sure that if there is a rapist on campus there are actual consequences that take them off the streets and protect people.

Mr. JEFFRIES. Right. But you acknowledge, of course, that the criminal justice system is imperfect, correct?

Mr. COHN. Absolutely.

Mr. JEFFRIES. And, you know, there are examples in the criminal justice system of people who have been sentenced to the death penalty who have subsequently been found to have been innocent, true?

Mr. COHN. There is no system that is perfect. But the criminal justice system is dramatically better at doing this than campuses, again, because of the tools that they bring to bear—

Mr. JEFFRIES. The reason the criminal justice system—

Mr. COHN.—one that is awful and one that might not be very good.

Mr. JEFFRIES. The reason the criminal justice system is imperfect—would you agree—is because of just the context of human error? And whenever you have got humans involved in the absence, perhaps, of adequate training, sensitivity, preparation, mistakes will be made.

Mr. COHN. Absolutely. But that is why we have so many procedural tools in the criminal justice system to try to balance that out so individual bias can't control that entire process; why we have meaningful appeals afterwards in the criminal justice system to provide additional levels of protection for error that don't really exist in campuses where the appeal often goes to the same person that decided the case, which is why the Safe Campus Act includes that provision about no commingling of responsibilities.

Mr. JEFFRIES. Ms. Maatz, could you comment on, you know, whether you think there are meaningful protections and/or safeguards in the campus process as it relates to sexual assault, outside of the availability of the criminal justice system?

Ms. MAATZ. There absolutely are meaningful protections. That is the whole point of Title IX; that is the whole point of the Clery Act, is to have colleges and universities examine those situations when they occur and to respond to them.

And respectfully, I would say, with Mr. Salmon's bill, if you make reporting mandatory to the police you have weakened Title IX. End of story. You have already said that it is not going to be a parallel process, that it is not going to be an equal process in terms of the emphasis.

So that is a bill, I think, that would weaken Title IX at a time, quite frankly, when we need it to be strong and we need as much technical assistance as we can get from the Department of Education so schools can be the good actors they want to be.

The reality is within the system they are supposed to have prevention training ongoing; they are supposed to be doing bystander intervention training ongoing; they are supposed to be training the folks who will be hearing these kinds of issues. And they have a choice as to what kind of format they will use in terms of administration hearing or student code of conduct.

There is flexibility here so that they can match it to their school, match it to the circumstances, match it to the—to their community, so that they can get a just result. It is supposed to be impartial and fair, and I do believe that it is.

Mr. JEFFRIES. Thank you.

I would just note in closing, as my time is about to expire, that it does seem to me that to the extent that there are imperfections in the context of the campus adjudication process that we should mend it not end it and address issues perhaps endemic to the fact that human error exists in all contexts, just like human error exists in the criminal justice context.

But we shouldn't abandon the entire process, particularly given there is a long history in American jurisprudence of having a parallel process: the criminal adjudication process, the opportunity for people to pursue vindication through the civil adjudication process, which, as all of you have pointed out, uses a preponderance of the evidence standard, the same exact standard used in the campus adjudication process.

Thank you for your testimony.

I yield back.

Chairwoman FOXX. Thank you very much.

Mr. Allen, you are recognized for 5 minutes.

Mr. ALLEN. Thank you, Madam Chair.

And thank you all for coming and sharing a—back when it—course, my kids say I am old-fashioned—back in my day we didn't talk about things like this, other than—I will tell you this: Growing up, if I ever did anything to harm another—a woman, I had to answer to my father. And it was—even my little sister. She could hit me and I couldn't hit her back, and that is the way I was taught.

I have three grown daughters, and, course, full disclosure, my—I have a son and he attended Wake Forest University, and we were on the parents' council there. And I will tell you this: They showed a film there to the parents' council that they show every freshman at Wake Forest College about the problems with alcohol.

That was the scariest thing I have ever seen in my life. And I tell you, any freshman that saw that obviously was prepared to know the consequences at least of misbehavior.

Having three grown daughters, you know, I understand—I mean, you—when your kids go off to college, I mean, you just pray they will live through the experience, you know, because it is just—you know, I mean, they are free to do things that—and it—course, I went to college so I remember things I did I shouldn't have done.

But anyway, let me just say this, that would it be appropriate—like I said, I knew the consequences of my actions. Could colleges and universities—and I know it is very difficult to get in Wake Forest, for example. I mean, it is—my son thought it was a great honor to attend that university.

But, I mean, can you read the riot act to these young men and just say, "You know, these are things that if you do you won't be here next semester"?

Dr. Rue, would you—I mean, is that—I mean, looks like to me that this is a—the universities should set the pace on this and say, "There are just some things we are not going to put up with here—put up here—put up with here at Wake Forest." Can you comment on that?

Ms. RUE. I would be happy to. I am going to go back to what CDC recommends in terms of multiple methods.

We know that the parental voice is one that students tend to tune out at this time of their lives, as they struggle for independ-

ence and define themselves. What we would say is that—and research shows—that if you approach men as brothers and boyfriends of people who might be assaulted, what you get is their empathy. And empathy is a much more powerful motivator than fear of some consequences. And you know, 18-year-olds think they are immortal, so—

Mr. ALLEN. Right.

Ms. RUE.—we really—

Mr. ALLEN. Bulletproofs is what we call them.

Ms. RUE. Yes. There you go.

We believe that engaging men in the prevention effort as coaches, as peers, is way more powerful than finger-wagging them, and mobilizing their maturity and their ability to care for their dear friends who have been assaulted. So treating them as potential allies rather than as potential perpetrators is way more powerful.

Mr. ALLEN. So I was not—when my daughters would date young men I would have them in, I would put the fear of God into them. That was the wrong idea?

[Laughter.]

Ms. RUE. With you, sir, I think it might work.

[Laughter.]

Mr. ALLEN. Well, obviously, you know, we were very fortunate, but I have eight grandchildren and three on the way, and six of them are little girls. And I have got a 14-year-old, and of course, she is entering high school now, so I have had my little talk with her and—but, yes, it seems to me that in so many cases that young men just don't know exactly right from wrong. I mean, they have been in—raised in an environment where they just don't have a value system, and then they commit a horrible thing and it is like, "What have I done here?" They really don't know until the consequences are forced on them.

So I would please just let, you know, your freshman class know—I know that alcohol—you know, they showed us a film in high school, the state patrol did, about driving, you know, and—of course, we didn't have texting back then or phones back then—but basically not paying attention, and the consequences of that. And, you know, that stuff, it does register.

And at least, you know, someone will know, "Well, gosh, I didn't know there was anything wrong with this. I mean, you know, this—these are modern times," or whatever.

But anyway, anything else that, Ms. Maatz or Mr. Cohn, you would like to comment on how we—you gotta—we gotta stop it.

Ms. MAATZ. Yes.

Mr. ALLEN. How do we stop this?

Ms. MAATZ. Well, and I think you have hit on a key point in terms of getting men involved. And the reality is, when you are doing this kind of programming, men as allies, not accusing, pointing fingers.

"We know that this happens. Here is what you can do about it because you have sisters, because you may have daughters, because you have friends that this could—this could impact."

That bystander intervention in particular can be particularly effective with men because they can distract, they can have another conversation.

And that peer pressure, you know? Never underestimate the power of the peer pressure.

Right now in some respects it is working against us, in terms of campus sexual assault, in terms of the norms, in terms of the stereotypes. And we need to make it work for us. And I think working with men in the process is a great way to do that.

The other thing I would say is that you need to bring in other folks from the entire community—not just fraternities and athletics departments, but the entire male community—

Mr. ALLEN. Save that comment—

Mr. COHN. May I have one—

Chairwoman FOXX. Mr. Cohn, I am going to have to ask you to put it in writing. Thank you very much.

Mr. COHN. Not a problem.

Chairwoman FOXX. Mr. Polis, you are recognized.

Mr. POLIS. Thank you.

Mr. Cohn, is the problem that you have with the campus judicial processes, is it the standard or is it what you consider to be a flawed implementation of the standards they use, or both?

Mr. COHN. I think both.

Mr. POLIS. So, now, I mean, it certainly seems reasonable that a school, for its own purposes, might want to use a preponderance of evidence standard, or even a lower standard, perhaps a likelihood standard. I mean, we are talking about a private institution, and if I was running one I might say, “Well, you know, even if there is a 20 or a 30 percent chance that it happened I wouldn’t want a—would want to remove this individual.”

Why shouldn’t a private institution, in the interest of promoting a safe environment, use an even lower standard than a preponderance of evidence, like a reasonable likelihood standard?

Mr. COHN. Right. Private institutions operate under different rules than the public ones because the Constitution doesn’t necessarily apply. So that question has been answered in the public institutions so that due process is paramount and due process requires reasonable determinations, which you don’t get under the even lower standards of preponderance.

Prior to the Department of Education—

Mr. POLIS. So is the—the lowest standard use under due process is preponderance of evidence?

Mr. COHN. The lowest standard you can use in a court for the fact-finding portion—

Mr. POLIS. Okay.

Mr. COHN.—would be preponderance. But that is—

Mr. POLIS. Well, but I think we are talking about, again, a—now, so if you are saying—say it would be a public university, can they say, “We want to use a reasonable likelihood standard for purposes of expulsion or whether a student can reenroll”?

Mr. COHN. I don’t think that would have any chance of satisfying a due process challenge, but I also—

Mr. POLIS. But a preponderance of evidence would. Is that—

Mr. COHN. No. I mean, a preponderance of the evidence can in some circumstances pass it, and it could fail in others, depending on what other procedural protections it is coupled with.

Mr. POLIS. Okay.

Mr. COHN. When a preponderance of the evidence—

Mr. POLIS. Well, it seems like we ought to provide more of a legal framework, then, that allows a reasonable likelihood standard or a preponderance of evidence standard. I mean, if there are 10 people that have been accused and, you know, under a reasonable likelihood standard maybe one or two did it, it seems better to get rid of all 10 people.

We are not talking about depriving them of life or liberty; we are talking about their transfer to another university, for crying out loud, or they go do something else.

Mr. COHN. Well, let's be more—let's be—

Mr. POLIS. I mean, you know, it is—

Mr. COHN. Let's be clear about this. That is not what we are talking about.

Mr. POLIS. Let me move on. I have a question for Ms. Maatz.

I want to thank you for your willingness to be here today, and I want to address specific concerns of sexual assault within the LGBT community. Polls have shown that 46 percent of bisexual women have been sexually assaulted and gay men are more than 10 times more likely to experience sexual assault than heterosexual men; 25 percent of transgender people have been assaulted after age 13.

What steps can schools take to ensure that sexual assault response teams and outreach is done in a culturally competent way regarding potential victims of sexual assault, including those who are sometimes marginalized and who identify as LGBT?

Ms. MAATZ. Right. Those statistics obviously are horrible. And they are more likely to be sexually harassed, as well, so the whole continuum of violence is something, obviously, that we know LGBTQ people experience at a much higher rate.

The great thing about Title IX, the beauty of it, is that it is a gender-neutral law, and so right from the get-go we have a tool that we can use for students to file a grievance if they would like to seek assistance.

We have talked about having these advisors that could be helpful to students in telling them what their rights are, telling them what the process will be, helping them understand and talk about whether they want to file official charges or not, and all of that needs to be culturally competent and understand that sexual assault is not just a heterosexual phenomenon; it is something—

Mr. POLIS. And along those lines, I think earlier where we were talking about engaging the men, engaging the men, I wanted to talk a minute about male victims, as well. What additional steps or outreach needs to be done with regard to reporting for male victims, for whom there could be a whole other set of issues, whether it is heterosexual or homosexual assault—or abuse?

Ms. MAATZ. Well, I think there is a variety of things that can happen, but I do think in this instance technology is our friend: making sure that information that is culturally competent on these issues is available to students, that it is sent out to them regularly, that is on the website, that is available in the student code of conduct, that is in the health center, that is in places where gay students socialize and congregate. Making sure all of that is available is huge.

Mr. POLIS. And it is important to show that potential victims of sexual assault can be of all genders and all sexual orientations, as well.

Ms. MAATZ. Absolutely. And so when you are training the folks who are going to be dealing with these cases, that has to be a huge element of it. It needs to be something that everyone understands.

And, quite frankly, there is wonderful guidance from the Department of Education about how Title IX applies specifically not only in terms of campus sexual assault, but also harassment based on gender identity as well.

Mr. POLIS. Thank you.

I yield back.

Chairwoman FOXX. Thank you, Mr. Polis.

Mr. Messer, you are recognized for 5 minutes.

Mr. MESSER. Thank you, Madam Chair. Thank you for holding this very important hearing.

Thank you, to the witnesses, for being here as well.

I am the father of a 12 and 11-year-old daughters and an 8-year-old son, and so they are not quite to college yet, but certainly an issue that means a lot to me. And we have several different college campuses on my—in my district, as well.

You know, to reiterate what many of my colleagues have said, when parents send their children off to college they deserve to know that they should be safe. And frankly, if even one student doesn't feel that way or isn't that way, that is one too many.

I wanted to give Mr. Cohn just a quick chance to respond to the comments. Just let me ask this question this way, and what can—so, given your testimony, what can colleges and universities do to improve their disciplinary processes in an effort to be more fair?

Mr. COHN. Right. I mean, you know, our Plan A would obviously have them not be doing that. But in our Plan B, where tomorrow campuses will still be adjudicating these cases, it is important to include real, meaningful protections like a right to counsel and active assistance of counsel for both parties.

By the time a school is trying to expel a student, they are not in the category of schools that is trying to sweep it under the rug, but they might not make the case particularly well. So having a lawyer who can speak up for the victim, you know, is also helpful to them to make sure the questions they want asked gets asked. So that is number one, the no comingling rule, so the same person who does the investigation isn't also serving as judge, jury, and fact-finder.

Making sure that you actually have the right to question, you know, the—you know, your accuser is important because we know that the ability to a confrontation type of clause is what helps us find truth. So there are ways that we can make it better.

But I do want to be clear about one last thing: We are not talking about just expelling someone so they can go to another school. That is not what is going on, because when students get expelled it tracks them for the remainder of their life.

Forget about getting a job with security clearance here in this town. Not too many schools are lining up to admit people who have been expelled for sexual assault elsewhere.

And again, the statements are admissible against them in criminal court. You are having 18-year-olds talk on the record about felonies that can put them in jail in Virginia, you know, or Missouri for the remainder of their lives.

Mr. MESSER. Well, reclaiming my time, I mean, I think we all recognize that this is a serious, important crime, needs to be dealt with, needs to be dealt with in a way that practically works. And so kind of opening up to the broader panel, I wanted to talk just a second and get some counsel.

As Congress is working through these issues, of course we have to deal—we have to work through the intersection between the sort of local law enforcement issues and the campus-based disciplinary processes that are in place to deal with student discipline, as well, and I think that our legislation needs to recognize and accommodate those differences. So could we get maybe some testimony on how to work through that?

Ms. SCADUTO. I would be happy to at least pile on, if you will, on the issue.

The goals and objectives of our internal discipline processes are different than those of the criminal justice system, and I think what has been lost over the last 4.5 years in the efforts of government and other interested parties to make sure that there is accountability for sexual violence on our campuses is the waters are muddied right now about what is the purpose of an on-campus disciplinary proceeding?

I will not call it a judicial proceeding. We are not going to find someone guilty of a crime; we are going to be looking at conduct in the framework of our campus community and our campus culture.

As Congress moves forward, as OCR moves forward, we need to tease out—and I addressed this in my written comments to this subcommittee—we need to tease out what is the purpose that you see for an on-campus discipline process. I can't speak for Dr. Rue, and I would ask her to answer quickly on her own behalf, but I believe there are very different purposes.

And please keep in mind that not every incident of sexual—of a violation of our sexual misconduct policies is sexual assault. It—

Mr. MESSER. So invite Dr. Rue to also respond?

Ms. RUE. Yes, certainly.

Again, we are trying to determine whether or not we have a safe and effective educational environment and whether our policies have been violated. We are perfectly comfortable with individuals choosing both pathways—choosing a criminal justice pathway and the university pathway.

No quarrel. We really believe the student should be able to decide that.

But our goal is to make sure we can remediate our own environment if needed through understanding what the risks are, and to making sure we are lowering barriers to individuals reporting right now, because that is our biggest concern. We know that the incidence, established by polls and studies, is nowhere near the number of reports, and we would like to close that gap, and we don't believe that approach would do so.

Mr. MESSER. Thank you for your testimony.

Chairwoman FOXX. Thank you. Gentleman's time has expired.

Ms. Bonamici, you are recognized for 5 minutes.

Ms. BONAMICI. Thank you very much, Chair Foxx and Ranking Member Hinojosa. Thank you for having me join your subcommittee today.

This is a topic that has been of import in my state of Oregon as well as across the country. We have had a lot of conversations about it. And in fact, just last week I had a great discussion hosted by Portland State University with our Oregon institutions, primarily the Title IX coordinators.

There are a lot of common themes that we heard today not only emphasizing the importance of the issue but the regulatory overlap and sometimes conflict—I think you will find a lot of support among this committee for clarifying that; but also the resources needed to address these issues.

And I am glad we have had a lot of conversations this morning about prevention and the importance of educating students about healthy relationships, consent and what that means, healthy sexual encounters. And I am glad we are talking about that before college—before they get to college.

Now, there were some conversations about the Teach Safe Relationships Act. There is a House version, which I am proud to cosponsor, along with a couple of other members of this committee. I do invite the other committee members and other colleagues to take a look at that and join on because if we are preventing, that is the best approach.

So we know we can take stronger steps not only in prevention, we want to make sure that survivors of sexual assault have access to resources, services, and privacy on and off campus. And I want to emphasize that we really need to have policies that encourage not discourage survivors from reporting and seeking counseling and assistance.

Dr. Rue, you discuss the important role of confidential advisors, and that is something that we are seeing in more institutions.

Now, earlier this year I wrote a letter to the Department of Education about an apparent loophole in FERPA. In some circumstances, attorneys for an institution can access students' counseling records without a court order.

The Department of Education's recent draft guidance to address this issue is encouraging, and I look forward to working with the administration and advocates and colleagues to close that loophole and provide survivors with the support and assurance of privacy. We want them to be safe and we want them to feel safe, and if they have a sense that their records are not going to be kept confidential, that may discourage them from seeking the support that they need.

So my home state is working on this issue. Earlier this year our governor, Kate Brown, signed legislation making clear that conversations between alleged campus assault survivors and their advocates are confidential.

Oregon also passed a bill that requires schools to give students who report sexual assaults written notification about their rights, legal options, campus services, and the state and community resources. And I just want to give a shout-out to Brenda Tracy, a

brave survivor of a gang rape on a campus several years ago, who is now a nurse and an advocate.

So these policies are important for students not only in Oregon but, you know, across the country, and I am really glad we are having these conversations today.

And I want to ask you, Ms. Maatz, we know that more institutions are starting to educate students about their rights under Title IX. Oregon State University, for example, is going to be opening a survivor advocacy center to provide confidential and accessible services; they are going to have a full-time advocate there.

So what can we do to expand services like that so more students know their rights? And what is the best way to let survivors know what resources are available to them on and off campus, and also let all students know that, not just survivors? They need to know what is there, and the best way to do that.

Ms. MAATZ. Right. Well, Title IX absolutely requires schools to not only put together an anti-discrimination policy, but to also have grievance procedures and, most importantly, to publish it in an ongoing way, to publicize it to students, to faculty, to staff. And technology can be our friend there, in terms of making sure that it is distributed frequently. It should also be used, obviously, in any on-campus prevention programs, and so forth.

I would like to get back, truthfully, to the climate surveys, because one of the things that I think is overlooked with the tool of the climate surveys is that it does give an opportunity for students to talk about their experiences. And in a climate—

Ms. BONAMICI. And reclaiming my time, I wanted to get to that issue, so in the few remaining seconds, could you talk about—because there is such a diversity among colleges and universities in size and resources, and we want meaningful responses. So do you have any suggestions about how we can accomplish that in a nationwide climate survey so that we get equity in response and distribution and participation?

Ms. MAATZ. Right. Well, we need to actually make sure that there are certain questions that all climate surveys ask. I think that is very important. The HALT Act would do climate surveys, and we need to have that generalizability across the country.

At the same time, each campus can personalize that particular climate survey to make sure they are asking questions key for their community, key for their constituents. And what is good about that is that it not only provides information to the school about what they should be doing—what they are doing that students don't like, what they are doing that could be better—but it lets the students know that the university is paying attention, that there are these programs, that there are these rights, that there are these protections. And that in and of itself is a huge community education program as well as a data-finding program that helps to make things better.

Ms. BONAMICI. Terrific.

My time is expired.

Chairwoman FOXX. Thank you.

Ms. BONAMICI. I yield back. Thank you, Madam Chair.

Chairwoman FOXX. I understand that Congresswoman Speier would like to speak, and I ask unanimous—

Mr. HINOJOSA. I ask unanimous consent that she be allowed and permitted to join the committee members for today and participate in this important hearing.

Chairwoman FOXX. Without objection, Congresswoman Speier is recognized for 5 minutes.

Ms. SPEIER. Thank you very much for allowing me to participate today. I apologize for not being here for the entire hearing—excuse me. I had a funeral to attend.

But I want to applaud the committee for recognizing the gravity of this issue and the importance of putting a spotlight on the issue and coming up with some solutions to dealing with it. I am sure you have undertaken a complete review with the panelists that are with us today, who are—many of whom are experts, about the fact that this is, indeed, a very serious problem. Regardless of how you crunch the numbers, the incidence is widespread on college campuses and we need to take steps to address it.

Let me say at the outset that I have worked on this issue now for over 2 years. I have worked very closely with my colleague on the other side of the aisle, Pat Meehan, and we have introduced the HALT Act.

But in doing all of this we have spent time with the Office of Civil Rights, and I want to commend them. The OCR within the Department of Education in the last couple of years has done an outstanding job of creating greater accountability, frankly, because we have seen for a very long period of time that the Title IX coordinators on most college campuses weren't even available to people. They were oftentimes buried in Web sites.

That all is changing now due in large part to dear colleagues letters that have been sent out by OCR and others.

It is personal to me because I have a daughter who is in college, and every college that we visited before she chose the college that she is now at, the first question that was asked by every parent—the first question when we were at orientations was what was the safety of that college for their child.

And this is a bipartisan issue, Madam Chair. I can't tell you the number of Republican fathers and Republican mothers who have said to me, "I am really upset that this issue hasn't been dealt with appropriately." And frankly, sometimes it is not until you are six degrees of separation that you appreciate how close it can come to you.

So climate surveys, which we have used very effectively in dealing with sexual assault in the military and has been used in the military for a long period of time, is something that we want to see incorporated by universities. It is a picture that helps them appreciate how significant the issue is.

The HALT Act will also provide for a number of other elements. You know, one of the things that Title IX does, it has a—it is a heavy hammer. If you aren't providing the kind of nondiscrimination in education you can lose all your federal funding, which means you lose all the grant money, you lose the option for student loans. And so it is a heavy hammer.

But it is, I think, important to create a system that provides some fiscal penalties short of that heavy hammer, and the HALT Act would do that.

It would also increase the violations—the penalties for violations to the Clery Act from \$35,000 to \$100,000 and create a private right of action under Clery for students whose institutions failed to inform them of safety risks and of their rights.

It provides more money for investigators in the Office of Civil Rights by about 5 million and—as an effort to decrease the backlog that exists right now with the Title IX complaints that have been filed.

Now, I spoke to a number of young women who had been assaulted at the University of California. I won't name the campus so they won't be drawn that closely under the microscope.

But in talking to these young women—and there is nothing like hearing the stories of these youngsters to appreciate how insidious this can be. And in many of those cases, the victims were never even interviewed.

That may be shocking to some of you, but that was commonplace. And how can you properly evaluate a case unless you interview both the perpetrator, or alleged perpetrator, and the victim as well?

The question as to whether or not colleges should be engaged in this at all—and, Ms. Scaduto, you had referenced that a few moments ago—you know, is probably a legitimate question. You all have codes of conduct, though, and under that code of conduct, if you violate that code of conduct you take actions to remove those individuals from the campus.

So you certainly have the wherewithal, and you certainly use that code of conduct in dismissing or suspending students who don't comply with the rules of the university. And I would suggest by being engaged in something that is clearly a crime, which rape is, that meets the standard of suspending or terminating a student. But I also appreciate that you, you know, have to weigh the various interests.

I do think that the Office of Civil Rights needs more resources. I do think that we should create a proactive responsibility that institutions, you know, plaster the notices of how you can seek Title IX coordinators in the bathrooms of every dorm and sorority and fraternity, and those simple things. The HALT Act goes beyond that.

And I see my time is expired, and I thank, again, the chair for the opportunity to participate.

Chairwoman FOXX. Thank you very much.

I want to thank our witnesses again for taking time to be here today.

I would like to recognize the ranking member for any closing comments.

Mr. HINOJOSA. Madam Chair, before I give my closing statement, I ask unanimous consent that the following five documents be submitted into the hearing record: number one, the U.S. Department of Education's 2014 guidance on Title IX and sexual violence; number two, U.S. Department of Education's list of higher education institutions with open Title IX sexual violation investigations as of September 2, 2015; number three, U.S. Department of Education's table chart Title IX, Clery Act, FERPA; number four, the letter from the National Alliance to End Sexual Violence; and lastly,

number five, the letter from Feminist Majority Foundation. I ask unanimous consent that be done.  
[The information follows:]



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

**Questions and Answers on Title IX and Sexual Violence<sup>1</sup>**

Title IX of the Education Amendments of 1972 ("Title IX")<sup>2</sup> is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities. All public and private elementary and secondary schools, school districts, colleges, and universities receiving any federal financial assistance (hereinafter "schools", "recipients", or "recipient institutions") must comply with Title IX.<sup>3</sup>

On April 4, 2011, the Office for Civil Rights (OCR) in the U.S. Department of Education issued a Dear Colleague Letter on student-on-student sexual harassment and sexual violence ("DCL").<sup>4</sup> The DCL explains a school's responsibility to respond promptly and effectively to sexual violence against students in accordance with the requirements of Title IX.<sup>5</sup> Specifically, the DCL:

- Provides guidance on the unique concerns that arise in sexual violence cases, such as a school's independent responsibility under Title IX to investigate (apart from any separate criminal investigation by local police) and address sexual violence.

<sup>1</sup> The Department has determined that this document is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), available at [www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507\\_good\\_guidance.pdf](http://www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf). The Office for Civil Rights (OCR) issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to [OCR@ed.gov](mailto:OCR@ed.gov), or write to the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, D.C. 20202.

<sup>2</sup> 20 U.S.C. § 1681 *et seq.*

<sup>3</sup> Throughout this document the term "schools" refers to recipients of federal financial assistance that operate educational programs or activities. For Title IX purposes, at the elementary and secondary school level, the recipient generally is the school district; and at the postsecondary level, the recipient is the individual institution of higher education. An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that the law's requirements conflict with the organization's religious tenets. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a). For application of this provision to a specific institution, please contact the appropriate OCR regional office.

<sup>4</sup> Available at <http://www.ed.gov/ocr/letters/colleague-201104.html>.

<sup>5</sup> Although this document and the DCL focus on sexual violence, the legal principles generally also apply to other forms of sexual harassment.

- Provides guidance and examples about key Title IX requirements and how they relate to sexual violence, such as the requirements to publish a policy against sex discrimination, designate a Title IX coordinator, and adopt and publish grievance procedures.
- Discusses proactive efforts schools can take to prevent sexual violence.
- Discusses the interplay between Title IX, the Family Educational Rights and Privacy Act ("FERPA"),<sup>6</sup> and the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act ("Clery Act")<sup>7</sup> as it relates to a complainant's right to know the outcome of his or her complaint, including relevant sanctions imposed on the perpetrator.
- Provides examples of remedies and enforcement strategies that schools and OCR may use to respond to sexual violence.

The DCL supplements OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, issued in 2001 (*2001 Guidance*).<sup>8</sup> The *2001 Guidance* discusses in detail the Title IX requirements related to sexual harassment of students by school employees, other students, or third parties. The DCL and the *2001 Guidance* remain in full force and we recommend reading these Questions and Answers in conjunction with these documents.

In responding to requests for technical assistance, OCR has determined that elementary and secondary schools and postsecondary institutions would benefit from additional guidance concerning their obligations under Title IX to address sexual violence as a form of sexual harassment. The following questions and answers further clarify the legal requirements and guidance articulated in the DCL and the *2001 Guidance* and include examples of proactive efforts schools can take to prevent sexual violence and remedies schools may use to end such conduct, prevent its recurrence, and address its effects. In order to gain a complete understanding of these legal requirements and recommendations, this document should be read in full.

Authorized by

/s/

Catherine E. Lhamon  
Assistant Secretary for Civil Rights

April 29, 2014

<sup>6</sup> 20 U.S.C. §1232g; 34 C.F.R. Part 99.

<sup>7</sup> 20 U.S.C. §1092(f).

<sup>8</sup> Available at <http://www.ed.gov/ocr/docs/shguide.html>.

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**A. A School's Obligation to Respond to Sexual Violence**

**A-1. What is sexual violence?**

**Answer:** Sexual violence, as that term is used in this document and prior OCR guidance, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent (*e.g.*, due to the student's age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent). A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion. Sexual violence can be carried out by school employees, other students, or third parties. All such acts of sexual violence are forms of sex discrimination prohibited by Title IX.

**A-2. How does Title IX apply to student-on-student sexual violence?**

**Answer:** Under Title IX, federally funded schools must ensure that students of all ages are not denied or limited in their ability to participate in or benefit from the school's educational programs or activities on the basis of sex. A school violates a student's rights under Title IX regarding student-on-student sexual violence when the following conditions are met: (1) the alleged conduct is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's educational program, *i.e.* creates a hostile environment; and (2) the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.<sup>9</sup>

**A-3. How does OCR determine if a hostile environment has been created?**

**Answer:** As discussed more fully in OCR's *2001 Guidance*, OCR considers a variety of related factors to determine if a hostile environment has been created; and also considers the conduct in question from both a subjective and an objective perspective. Specifically, OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical. Indeed, a single or isolated incident of sexual violence may create a hostile environment.

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<sup>9</sup> This is the standard for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief. See *2001 Guidance* at ii-v, 12-13. The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. See *Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629, 643 (1999).

**A-4. When does OCR consider a school to have notice of student-on-student sexual violence?**

**Answer:** OCR deems a school to have notice of student-on-student sexual violence if a responsible employee knew, or in the exercise of reasonable care should have known, about the sexual violence. See question D-2 regarding who is a responsible employee.

A school can receive notice of sexual violence in many different ways. Some examples of notice include: a student may have filed a grievance with or otherwise informed the school's Title IX coordinator; a student, parent, friend, or other individual may have reported an incident to a teacher, principal, campus law enforcement, staff in the office of student affairs, or other responsible employee; or a teacher or dean may have witnessed the sexual violence.

The school may also receive notice about sexual violence in an indirect manner, from sources such as a member of the local community, social networking sites, or the media. In some situations, if the school knows of incidents of sexual violence, the exercise of reasonable care should trigger an investigation that would lead to the discovery of additional incidents. For example, if school officials receive a credible report that a student has perpetrated several acts of sexual violence against different students, that pattern of conduct should trigger an inquiry as to whether other students have been subjected to sexual violence by that student. In other cases, the pervasiveness of the sexual violence may be widespread, openly practiced, or well-known among students or employees. In those cases, OCR may conclude that the school should have known of the hostile environment. In other words, if the school would have found out about the sexual violence had it made a proper inquiry, knowledge of the sexual violence will be imputed to the school even if the school failed to make an inquiry. A school's failure to take prompt and effective corrective action in such cases (as described in questions G-1 to G-3 and H-1 to H-3) would violate Title IX even if the student did not use the school's grievance procedures or otherwise inform the school of the sexual violence.

**A-5. What are a school's basic responsibilities to address student-on-student sexual violence?**

**Answer:** When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate or otherwise determine what occurred (subject to the confidentiality provisions discussed in Section E). If an investigation reveals that sexual violence created a hostile environment, the school must then take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its

effects. But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.

Title IX requires a school to protect the complainant and ensure his or her safety as necessary, including taking interim steps before the final outcome of any investigation.<sup>10</sup> The school should take these steps promptly once it has notice of a sexual violence allegation and should provide the complainant with periodic updates on the status of the investigation. If the school determines that the sexual violence occurred, the school must continue to take these steps to protect the complainant and ensure his or her safety, as necessary. The school should also ensure that the complainant is aware of any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement. For additional information on interim measures, see questions G-1 to G-3.

If a school delays responding to allegations of sexual violence or responds inappropriately, the school's own inaction may subject the student to a hostile environment. If it does, the school will also be required to remedy the effects of the sexual violence that could reasonably have been prevented had the school responded promptly and appropriately. For example, if a school's ignoring of a student's complaints of sexual assault by a fellow student results in the complaining student having to remain in classes with the other student for several weeks and the complaining student's grades suffer because he or she was unable to concentrate in these classes, the school may need to permit the complaining student to retake the classes without an academic or financial penalty (in addition to any other remedies) in order to address the effects of the sexual violence.

**A-6. Does Title IX cover employee-on-student sexual violence, such as sexual abuse of children?**

**Answer:** Yes. Although this document and the DCL focus on student-on-student sexual violence, Title IX also protects students from other forms of sexual harassment (including sexual violence and sexual abuse), such as sexual harassment carried out by school employees. Sexual harassment by school employees can include unwelcome sexual advances; requests for sexual favors; and other verbal, nonverbal, or physical conduct of a sexual nature, including but not limited to sexual activity. Title IX's prohibition against

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<sup>10</sup> Throughout this document, unless otherwise noted, the term "complainant" refers to the student who allegedly experienced the sexual violence.

sexual harassment generally does not extend to legitimate nonsexual touching or other nonsexual conduct. But in some circumstances, nonsexual conduct may take on sexual connotations and rise to the level of sexual harassment. For example, a teacher repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment. Early signs of inappropriate behavior with a child can be the key to identifying and preventing sexual abuse by school personnel.

A school's Title IX obligations regarding sexual harassment by employees can, in some instances, be greater than those described in this document and the DCL. Recipients should refer to OCR's *2001 Guidance* for further information about Title IX obligations regarding harassment of students by school employees. In addition, many state and local laws have mandatory reporting requirements for schools working with minors. Recipients should be careful to satisfy their state and local legal obligations in addition to their Title IX obligations, including training to ensure that school employees are aware of their obligations under such state and local laws and the consequences for failing to satisfy those obligations.

With respect to sexual activity in particular, OCR will always view as unwelcome and nonconsensual sexual activity between an adult school employee and an elementary school student or any student below the legal age of consent in his or her state. In cases involving a student who meets the legal age of consent in his or her state, there will still be a strong presumption that sexual activity between an adult school employee and a student is unwelcome and nonconsensual. When a school is on notice that a school employee has sexually harassed a student, it is responsible for taking prompt and effective steps reasonably calculated to end the sexual harassment, eliminate the hostile environment, prevent its recurrence, and remedy its effects. Indeed, even if a school was not on notice, the school is nonetheless responsible for remedying any effects of the sexual harassment on the student, as well as for ending the sexual harassment and preventing its recurrence, when the employee engaged in the sexual activity in the context of the employee's provision of aid, benefits, or services to students (*e.g.*, teaching, counseling, supervising, advising, or transporting students).

A school should take steps to protect its students from sexual abuse by its employees. It is therefore imperative for a school to develop policies prohibiting inappropriate conduct by school personnel and procedures for identifying and responding to such conduct. For example, this could include implementing codes of conduct, which might address what is commonly known as grooming – a desensitization strategy common in adult educator sexual misconduct. Such policies and procedures can ensure that students, parents, and

school personnel have clear guidelines on what are appropriate and inappropriate interactions between adults and students in a school setting or in school-sponsored activities. Additionally, a school should provide training for administrators, teachers, staff, parents, and age-appropriate classroom information for students to ensure that everyone understands what types of conduct are prohibited and knows how to respond when problems arise.<sup>11</sup>

## **B. Students Protected by Title IX**

### **B-1. Does Title IX protect all students from sexual violence?**

**Answer:** Yes. Title IX protects all students at recipient institutions from sex discrimination, including sexual violence. Any student can experience sexual violence: from elementary to professional school students; male and female students; straight, gay, lesbian, bisexual and transgender students; part-time and full-time students; students with and without disabilities; and students of different races and national origins.

### **B-2. How should a school handle sexual violence complaints in which the complainant and the alleged perpetrator are members of the same sex?**

**Answer:** A school's obligation to respond appropriately to sexual violence complaints is the same irrespective of the sex or sexes of the parties involved. Title IX protects all students from sexual violence, regardless of the sex of the alleged perpetrator or complainant, including when they are members of the same sex. A school must investigate and resolve allegations of sexual violence involving parties of the same sex using the same procedures and standards that it uses in all complaints involving sexual violence.

Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation. Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school's obligations. Indeed, lesbian, gay, bisexual, and transgender (LGBT) youth report high rates of sexual harassment and sexual violence. A school should investigate and resolve allegations of sexual violence regarding LGBT students using the same procedures and standards that it

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<sup>11</sup> For additional informational on training please see the Department of Education's Resource and Emergency Management for Schools Technical Assistance Center – Adult Sexual Misconduct in Schools: Prevention and Management Training, available at [http://rems.ed.gov/Docs/ASM\\_Marketing\\_Flyer.pdf](http://rems.ed.gov/Docs/ASM_Marketing_Flyer.pdf).

uses in all complaints involving sexual violence. The fact that incidents of sexual violence may be accompanied by anti-gay comments or be partly based on a student's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy those instances of sexual violence.

If a school's policies related to sexual violence include examples of particular types of conduct that violate the school's prohibition on sexual violence, the school should consider including examples of same-sex conduct. In addition, a school should ensure that staff are capable of providing culturally competent counseling to all complainants. Thus, a school should ensure that its counselors and other staff who are responsible for receiving and responding to complaints of sexual violence, including investigators and hearing board members, receive appropriate training about working with LGBT and gender-nonconforming students and same-sex sexual violence. See questions J-1 to J-4 for additional information regarding training.

Gay-straight alliances and similar student-initiated groups can also play an important role in creating safer school environments for LGBT students. On June 14, 2011, the Department issued guidance about the rights of student-initiated groups in public secondary schools under the Equal Access Act. That guidance is available at <http://www2.ed.gov/policy/elsec/guid/secletter/110607.html>.

**B-3. What issues may arise with respect to students with disabilities who experience sexual violence?**

**Answer:** When students with disabilities experience sexual violence, federal civil rights laws other than Title IX may also be relevant to a school's responsibility to investigate and address such incidents.<sup>12</sup> Certain students require additional assistance and support. For example, students with intellectual disabilities may need additional help in learning about sexual violence, including a school's sexual violence education and prevention programs, what constitutes sexual violence and how students can report incidents of sexual

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<sup>12</sup> OCR enforces two civil rights laws that prohibit disability discrimination. Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits disability discrimination by public or private entities that receive federal financial assistance, and Title II of the American with Disabilities Act of 1990 (Title II) prohibits disability discrimination by all state and local public entities, regardless of whether they receive federal funding. See 29 U.S.C. § 794 and 34 C.F.R. part 104; 42 U.S.C. § 12131 *et seq.* and 28 C.F.R. part 35. OCR and the U.S. Department of Justice (DOJ) share the responsibility of enforcing Title II in the educational context. The Department of Education's Office of Special Education Programs in the Office of Special Education and Rehabilitative Services administers Part B of the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. 1400 *et seq.* and 34 C.F.R. part 300. IDEA provides financial assistance to states, and through them to local educational agencies, to assist in providing special education and related services to eligible children with disabilities ages three through twenty-one, inclusive.

violence. In addition, students with disabilities who experience sexual violence may require additional services and supports, including psychological services and counseling services. Postsecondary students who need these additional services and supports can seek assistance from the institution's disability resource office.

A student who has not been previously determined to have a disability may, as a result of experiencing sexual violence, develop a mental health-related disability that could cause the student to need special education and related services. At the elementary and secondary education level, this may trigger a school's child find obligations under IDEA and the evaluation and placement requirements under Section 504, which together require a school to evaluate a student suspected of having a disability to determine if he or she has a disability that requires special education or related aids and services.<sup>13</sup>

A school must also ensure that any school reporting forms, information, or training about sexual violence be provided in a manner that is accessible to students and employees with disabilities, for example, by providing electronically-accessible versions of paper forms to individuals with print disabilities, or by providing a sign language interpreter to a deaf individual attending a training. See question J-4 for more detailed information on student training.

**B-4. What issues arise with respect to international students and undocumented students who experience sexual violence?**

**Answer:** Title IX protects all students at recipient institutions in the United States regardless of national origin, immigration status, or citizenship status.<sup>14</sup> A school should ensure that all students regardless of their immigration status, including undocumented students and international students, are aware of their rights under Title IX. A school must also ensure that any school reporting forms, information, or training about sexual violence be provided in a manner accessible to students who are English language learners. OCR recommends that a school coordinate with its international office and its undocumented student program coordinator, if applicable, to help communicate information about Title IX in languages that are accessible to these groups of students. OCR also encourages schools to provide foreign national complainants with information about the U nonimmigrant status and the T nonimmigrant status. The U nonimmigrant status is set

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<sup>13</sup> See 34 C.F.R. §§ 300.8; 300.111; 300.201; 300.300-300.311 (IDEA); 34 C.F.R. §§ 104.3(j) and 104.35 (Section 504). Schools must comply with applicable consent requirements with respect to evaluations. See 34 C.F.R. § 300.300.

<sup>14</sup> OCR enforces Title VI of the Civil Rights Act of 1964, which prohibits discrimination by recipients of federal financial assistance on the basis of race, color, or national origin. 42 U.S.C. § 2000d.

aside for victims of certain crimes who have suffered substantial mental or physical abuse as a result of the crime and are helpful to law enforcement agency in the investigation or prosecution of the qualifying criminal activity.<sup>15</sup> The T nonimmigrant status is available for victims of severe forms of human trafficking who generally comply with a law enforcement agency in the investigation or prosecution of the human trafficking and who would suffer extreme hardship involving unusual and severe harm if they were removed from the United States.<sup>16</sup>

A school should be mindful that unique issues may arise when a foreign student on a student visa experiences sexual violence. For example, certain student visas require the student to maintain a full-time course load (generally at least 12 academic credit hours per term), but a student may need to take a reduced course load while recovering from the immediate effects of the sexual violence. OCR recommends that a school take steps to ensure that international students on student visas understand that they must typically seek prior approval of the designated school official (DSO) for student visas to drop below a full-time course load. A school may also want to encourage its employees involved in handling sexual violence complaints and counseling students who have experienced sexual violence to approach the DSO on the student's behalf if the student wishes to drop below a full-time course load. OCR recommends that a school take steps to ensure that its employees who work with international students, including the school's DSO, are trained on the school's sexual violence policies and that employees involved in handling sexual violence complaints and counseling students who have experienced sexual violence are aware of the special issues that international students may encounter. See questions J-1 to J-4 for additional information regarding training.

A school should also be aware that threatening students with deportation or invoking a student's immigration status in an attempt to intimidate or deter a student from filing a Title IX complaint would violate Title IX's protections against retaliation. For more information on retaliation see question K-1.

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<sup>15</sup> For more information on the U nonimmigrant status, see <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/questions-answers-victims-criminal-activity-u-nonimmigrant-status>.

<sup>16</sup> For more information on the T nonimmigrant status, see <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status>.

**B-5. How should a school respond to sexual violence when the alleged perpetrator is not affiliated with the school?**

**Answer:** The appropriate response will differ depending on the level of control the school has over the alleged perpetrator. For example, if an athlete or band member from a visiting school sexually assaults a student at the home school, the home school may not be able to discipline or take other direct action against the visiting athlete or band member. However (and subject to the confidentiality provisions discussed in Section E), it should conduct an inquiry into what occurred and should report the incident to the visiting school and encourage the visiting school to take appropriate action to prevent further sexual violence. The home school should also notify the student of any right to file a complaint with the alleged perpetrator's school or local law enforcement. The home school may also decide not to invite the visiting school back to its campus.

Even though a school's ability to take direct action against a particular perpetrator may be limited, the school must still take steps to provide appropriate remedies for the complainant and, where appropriate, the broader school population. This may include providing support services for the complainant, and issuing new policy statements making it clear that the school does not tolerate sexual violence and will respond to any reports about such incidents. For additional information on interim measures see questions G-1 to G-3.

**C. Title IX Procedural Requirements**

Overview

**C-1. What procedures must a school have in place to prevent sexual violence and resolve complaints?**

**Answer:** The Title IX regulations outline three key procedural requirements. Each school must:

- (1) disseminate a notice of nondiscrimination (see question C-2);<sup>17</sup>
- (2) designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX (see questions C-3 to C-4);<sup>18</sup> and

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<sup>17</sup> 34 C.F.R. § 106.9.

<sup>18</sup> *Id.* § 106.8(a).

(3) adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee sex discrimination complaints (see questions C-5 to C-6).<sup>19</sup>

These requirements apply to all forms of sex discrimination and are particularly important for preventing and effectively responding to sexual violence.

Procedural requirements under other federal laws may also apply to complaints of sexual violence, including the requirements of the Clery Act.<sup>20</sup> For additional information about the procedural requirements in the Clery Act, please see <http://www2.ed.gov/admins/lead/safety/campus.html>.

#### Notice of Nondiscrimination

#### **C-2. What information must be included in a school's notice of nondiscrimination?**

**Answer:** The notice of nondiscrimination must state that the school does not discriminate on the basis of sex in its education programs and activities, and that it is required by Title IX not to discriminate in such a manner. The notice must state that questions regarding Title IX may be referred to the school's Title IX coordinator or to OCR. The school must notify all of its students and employees of the name or title, office address, telephone number, and email address of the school's designated Title IX coordinator.<sup>21</sup>

#### Title IX Coordinator

#### **C-3. What are a Title IX coordinator's responsibilities?**

**Answer:** A Title IX coordinator's core responsibilities include overseeing the school's response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints. This means that the Title IX coordinator must have knowledge of the requirements of Title IX, of the school's own policies and procedures on sex discrimination, and of all complaints raising Title IX issues throughout the school. To accomplish this, subject to the exemption for school counseling employees discussed in question E-3, the Title IX coordinator must be informed of all

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<sup>19</sup> *Id.* § 106.8(b).

<sup>20</sup> All postsecondary institutions participating in the Higher Education Act's Title IV student financial assistance programs must comply with the Clery Act.

<sup>21</sup> For more information on notices of nondiscrimination, please see OCR's Notice of Nondiscrimination (August 2010), available at <http://www.ed.gov/ocr/docs/nondisc.pdf>.

reports and complaints raising Title IX issues, even if the report or complaint was initially filed with another individual or office or if the investigation will be conducted by another individual or office. The school should ensure that the Title IX coordinator is given the training, authority, and visibility necessary to fulfill these responsibilities.

Because the Title IX coordinator must have knowledge of all Title IX reports and complaints at the school, this individual (when properly trained) is generally in the best position to evaluate a student's request for confidentiality in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students. A school may determine, however, that another individual should perform this role. For additional information on confidentiality requests, see questions E-1 to E-4. If a school relies in part on its disciplinary procedures to meet its Title IX obligations, the Title IX coordinator should review the disciplinary procedures to ensure that the procedures comply with the prompt and equitable requirements of Title IX as discussed in question C-5.

In addition to these core responsibilities, a school may decide to give its Title IX coordinator additional responsibilities, such as: providing training to students, faculty, and staff on Title IX issues; conducting Title IX investigations, including investigating facts relevant to a complaint, and determining appropriate sanctions against the perpetrator and remedies for the complainant; determining appropriate interim measures for a complainant upon learning of a report or complaint of sexual violence; and ensuring that appropriate policies and procedures are in place for working with local law enforcement and coordinating services with local victim advocacy organizations and service providers, including rape crisis centers. A school must ensure that its Title IX coordinator is appropriately trained in all areas over which he or she has responsibility. The Title IX coordinator or designee should also be available to meet with students as needed.

If a school designates more than one Title IX coordinator, the school's notice of nondiscrimination and Title IX grievance procedures should describe each coordinator's responsibilities, and one coordinator should be designated as having ultimate oversight responsibility.

**C-4. Are there any employees who should not serve as the Title IX coordinator?**

**Answer:** Title IX does not categorically preclude particular employees from serving as Title IX coordinators. However, Title IX coordinators should not have other job responsibilities that may create a conflict of interest. Because some complaints may raise issues as to whether or how well the school has met its Title IX obligations, designating

the same employee to serve both as the Title IX coordinator and the general counsel (which could include representing the school in legal claims alleging Title IX violations) poses a serious risk of a conflict of interest. Other employees whose job responsibilities may conflict with a Title IX coordinator's responsibilities include Directors of Athletics, Deans of Students, and any employee who serves on the judicial/hearing board or to whom an appeal might be made. Designating a full-time Title IX coordinator will minimize the risk of a conflict of interest.

Grievance Procedures

**C-5. Under Title IX, what elements should be included in a school's procedures for responding to complaints of sexual violence?**

**Answer:** Title IX requires that a school adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints of sex discrimination, including sexual violence. In evaluating whether a school's grievance procedures satisfy this requirement, OCR will review all aspects of a school's policies and practices, including the following elements that are critical to achieve compliance with Title IX:

- (1) notice to students, parents of elementary and secondary students, and employees of the grievance procedures, including where complaints may be filed;
- (2) application of the grievance procedures to complaints filed by students or on their behalf alleging sexual violence carried out by employees, other students, or third parties;
- (3) provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and alleged perpetrator to present witnesses and evidence;
- (4) designated and reasonably prompt time frames for the major stages of the complaint process (see question F-8);
- (5) written notice to the complainant and alleged perpetrator of the outcome of the complaint (see question H-3); and
- (6) assurance that the school will take steps to prevent recurrence of any sexual violence and remedy discriminatory effects on the complainant and others, if appropriate.

To ensure that students and employees have a clear understanding of what constitutes sexual violence, the potential consequences for such conduct, and how the school processes complaints, a school's Title IX grievance procedures should also explicitly include the following in writing, some of which themselves are mandatory obligations under Title IX:

- (1) a statement of the school's jurisdiction over Title IX complaints;
- (2) adequate definitions of sexual harassment (which includes sexual violence) and an explanation as to when such conduct creates a hostile environment;
- (3) reporting policies and protocols, including provisions for confidential reporting;
- (4) identification of the employee or employees responsible for evaluating requests for confidentiality;
- (5) notice that Title IX prohibits retaliation;
- (6) notice of a student's right to file a criminal complaint and a Title IX complaint simultaneously;
- (7) notice of available interim measures that may be taken to protect the student in the educational setting;
- (8) the evidentiary standard that must be used (preponderance of the evidence) (*i.e.*, more likely than not that sexual violence occurred) in resolving a complaint;
- (9) notice of potential remedies for students;
- (10) notice of potential sanctions against perpetrators; and
- (11) sources of counseling, advocacy, and support.

For more information on interim measures, see questions G-1 to G-3.

The rights established under Title IX must be interpreted consistently with any federally guaranteed due process rights. Procedures that ensure the Title IX rights of the complainant, while at the same time according any federally guaranteed due process to both parties involved, will lead to sound and supportable decisions. Of course, a school should ensure that steps to accord any due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.

A school's procedures and practices will vary in detail, specificity, and components, reflecting differences in the age of its students, school size and administrative structure, state or local legal requirements (e.g., mandatory reporting requirements for schools working with minors), and what it has learned from past experiences.

**C-6. Is a school required to use separate grievance procedures for sexual violence complaints?**

**Answer:** No. Under Title IX, a school may use student disciplinary procedures, general Title IX grievance procedures, sexual harassment procedures, or separate procedures to resolve sexual violence complaints. However, any procedures used for sexual violence complaints, including disciplinary procedures, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution (as discussed in question C-5), including applying the preponderance of the evidence standard of review. As discussed in question C-3, the Title IX coordinator should review any process used to resolve complaints of sexual violence to ensure it complies with requirements for prompt and equitable resolution of these complaints. When using disciplinary procedures, which are often focused on the alleged perpetrator and can take considerable time, a school should be mindful of its obligation to provide interim measures to protect the complainant in the educational setting. For more information on timeframes and interim measures, see questions F-8 and G-1 to G-3.

**D. Responsible Employees and Reporting**<sup>22</sup>

**D-1. Which school employees are obligated to report incidents of possible sexual violence to school officials?**

**Answer:** Under Title IX, whether an individual is obligated to report incidents of alleged sexual violence generally depends on whether the individual is a responsible employee of the school. A responsible employee must report incidents of sexual violence to the Title IX coordinator or other appropriate school designee, subject to the exemption for school counseling employees discussed in question E-3. This is because, as discussed in question A-4, a school is obligated to address sexual violence about which a responsible employee knew or should have known. As explained in question C-3, the Title IX coordinator must be informed of all reports and complaints raising Title IX issues, even if the report or

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<sup>22</sup> This document addresses only Title IX's reporting requirements. It does not address requirements under the Clery Act or other federal, state, or local laws, or an individual school's code of conduct.

complaint was initially filed with another individual or office, subject to the exemption for school counseling employees discussed in question E-3.

**D-2. Who is a “responsible employee”?**

**Answer:** According to OCR’s *2001 Guidance*, a responsible employee includes any employee: who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty.<sup>23</sup>

A school must make clear to all of its employees and students which staff members are responsible employees so that students can make informed decisions about whether to disclose information to those employees. A school must also inform all employees of their own reporting responsibilities and the importance of informing complainants of: the reporting obligations of responsible employees; complainants’ option to request confidentiality and available confidential advocacy, counseling, or other support services; and complainants’ right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement.

Whether an employee is a responsible employee will vary depending on factors such as the age and education level of the student, the type of position held by the employee, and consideration of both formal and informal school practices and procedures. For example, while it may be reasonable for an elementary school student to believe that a custodial staff member or cafeteria worker has the authority or responsibility to address student misconduct, it is less reasonable for a college student to believe that a custodial staff member or dining hall employee has this same authority.

As noted in response to question A-4, when a responsible employee knows or reasonably should know of possible sexual violence, OCR deems a school to have notice of the sexual violence. The school must take immediate and appropriate steps to investigate or otherwise determine what occurred (subject to the confidentiality provisions discussed in Section E), and, if the school determines that sexual violence created a hostile environment, the school must then take appropriate steps to address the situation. The

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<sup>23</sup> The Supreme Court held that a school will only be liable for money damages in a private lawsuit where there is actual notice to a school official with the authority to address the alleged discrimination and take corrective action. *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 290 (1998), and *Davis*, 524 U.S. at 642. The concept of a “responsible employee” under OCR’s guidance for administrative enforcement of Title IX is broader.

school has this obligation regardless of whether the student, student's parent, or a third party files a formal complaint. For additional information on a school's responsibilities to address student-on-student sexual violence, see question A-5. For additional information on training for school employees, see questions J-1 to J-3.

**D-3. What information is a responsible employee obligated to report about an incident of possible student-on-student sexual violence?**

**Answer:** Subject to the exemption for school counseling employees discussed in question E-3, a responsible employee must report to the school's Title IX coordinator, or other appropriate school designee, all relevant details about the alleged sexual violence that the student or another person has shared and that the school will need to determine what occurred and to resolve the situation. This includes the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location. A school must make clear to its responsible employees to whom they should report an incident of alleged sexual violence.

To ensure compliance with these reporting obligations, it is important for a school to train its responsible employees on Title IX and the school's sexual violence policies and procedures. For more information on appropriate training for school employees, see question J-1 to J-3.

**D-4. What should a responsible employee tell a student who discloses an incident of sexual violence?**

**Answer:** Before a student reveals information that he or she may wish to keep confidential, a responsible employee should make every effort to ensure that the student understands: (i) the employee's obligation to report the names of the alleged perpetrator and student involved in the alleged sexual violence, as well as relevant facts regarding the alleged incident (including the date, time, and location), to the Title IX coordinator or other appropriate school officials, (ii) the student's option to request that the school maintain his or her confidentiality, which the school (*e.g.*, Title IX coordinator) will consider, and (iii) the student's ability to share the information confidentially with counseling, advocacy, health, mental health, or sexual-assault-related services (*e.g.*, sexual assault resource centers, campus health centers, pastoral counselors, and campus mental health centers). As discussed in questions E-1 and E-2, if the student requests confidentiality, the Title IX coordinator or other appropriate school designee responsible for evaluating requests for confidentiality should make every effort to respect this request

and should evaluate the request in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students.

**D-5. If a student informs a resident assistant/advisor (RA) that he or she was subjected to sexual violence by a fellow student, is the RA obligated under Title IX to report the incident to school officials?**

**Answer:** As discussed in questions D-1 and D-2, for Title IX purposes, whether an individual is obligated under Title IX to report alleged sexual violence to the school's Title IX coordinator or other appropriate school designee generally depends on whether the individual is a responsible employee.

The duties and responsibilities of RAs vary among schools, and, therefore, a school should consider its own policies and procedures to determine whether its RAs are responsible employees who must report incidents of sexual violence to the Title IX coordinator or other appropriate school designee.<sup>24</sup> When making this determination, a school should consider if its RAs have the general authority to take action to redress misconduct or the duty to report misconduct to appropriate school officials, as well as whether students could reasonably believe that RAs have this authority or duty. A school should also consider whether it has determined and clearly informed students that RAs are generally available for confidential discussions and do not have the authority or responsibility to take action to redress any misconduct or to report any misconduct to the Title IX coordinator or other appropriate school officials. A school should pay particular attention to its RAs' obligations to report other student violations of school policy (*e.g.*, drug and alcohol violations or physical assault). If an RA is required to report other misconduct that violates school policy, then the RA would be considered a responsible employee obligated to report incidents of sexual violence that violate school policy.

If an RA is a responsible employee, the RA should make every effort to ensure that *before* the student reveals information that he or she may wish to keep confidential, the student understands the RA's reporting obligation and the student's option to request that the school maintain confidentiality. It is therefore important that schools widely disseminate policies and provide regular training clearly identifying the places where students can seek confidential support services so that students are aware of this information. The RA

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<sup>24</sup> Postsecondary institutions should be aware that, regardless of whether an RA is a responsible employee under Title IX, RAs are considered "campus security authorities" under the Clery Act. A school's responsibilities in regard to crimes reported to campus security authorities are discussed in the Department's regulations on the Clery Act at 34 C.F.R. § 668.46.

should also explain to the student (again, before the student reveals information that he or she may wish to keep confidential) that, although the RA must report the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location to the Title IX coordinator or other appropriate school designee, the school will protect the student's confidentiality to the greatest extent possible. Prior to providing information about the incident to the Title IX coordinator or other appropriate school designee, the RA should consult with the student about how to protect his or her safety and the details of what will be shared with the Title IX coordinator. The RA should explain to the student that reporting this information to the Title IX coordinator or other appropriate school designee does not necessarily mean that a formal complaint or investigation under the school's Title IX grievance procedure must be initiated if the student requests confidentiality. As discussed in questions E-1 and E-2, if the student requests confidentiality, the Title IX coordinator or other appropriate school designee responsible for evaluating requests for confidentiality should make every effort to respect this request and should evaluate the request in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students.

Regardless of whether a reporting obligation exists, all RAs should inform students of their right to file a Title IX complaint with the school and report a crime to campus or local law enforcement. If a student discloses sexual violence to an RA who is a responsible employee, the school will be deemed to have notice of the sexual violence even if the student does not file a Title IX complaint. Additionally, all RAs should provide students with information regarding on-campus resources, including victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. RAs should also be familiar with local rape crisis centers or other off-campus resources and provide this information to students.

**E. Confidentiality and a School's Obligation to Respond to Sexual Violence**

**E-1. How should a school respond to a student's request that his or her name not be disclosed to the alleged perpetrator or that no investigation or disciplinary action be pursued to address the alleged sexual violence?**

**Answer:** Students, or parents of minor students, reporting incidents of sexual violence sometimes ask that the students' names not be disclosed to the alleged perpetrators or that no investigation or disciplinary action be pursued to address the alleged sexual violence. OCR strongly supports a student's interest in confidentiality in cases involving sexual violence. There are situations in which a school must override a student's request

for confidentiality in order to meet its Title IX obligations; however, these instances will be limited and the information should only be shared with individuals who are responsible for handling the school's response to incidents of sexual violence. Given the sensitive nature of reports of sexual violence, a school should ensure that the information is maintained in a secure manner. A school should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence. In the case of minors, state mandatory reporting laws may require disclosure, but can generally be followed without disclosing information to school personnel who are not responsible for handling the school's response to incidents of sexual violence.<sup>25</sup>

Even if a student does not specifically ask for confidentiality, to the extent possible, a school should only disclose information regarding alleged incidents of sexual violence to individuals who are responsible for handling the school's response. To improve trust in the process for investigating sexual violence complaints, a school should notify students of the information that will be disclosed, to whom it will be disclosed, and why. Regardless of whether a student complainant requests confidentiality, a school must take steps to protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. For additional information on interim measures see questions G-1 to G-3.

For Title IX purposes, if a student requests that his or her name not be revealed to the alleged perpetrator or asks that the school not investigate or seek action against the alleged perpetrator, the school should inform the student that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the alleged perpetrator. The school should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials. When a school knows or reasonably should know of possible retaliation by other students or third parties, including threats, intimidation, coercion, or discrimination (including harassment), it must take immediate

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<sup>25</sup> The school should be aware of the alleged student perpetrator's right under the Family Educational Rights and Privacy Act ("FERPA") to request to inspect and review information about the allegations if the information directly relates to the alleged student perpetrator and the information is maintained by the school as an education record. In such a case, the school must either redact the complainant's name and all identifying information before allowing the alleged perpetrator to inspect and review the sections of the complaint that relate to him or her, or must inform the alleged perpetrator of the specific information in the complaint that are about the alleged perpetrator. See 34 C.F.R. § 99.12(a). The school should also make complainants aware of this right and explain how it might affect the school's ability to maintain complete confidentiality.

and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and ensure his or her safety as necessary. See question K-1 regarding retaliation.

If the student still requests that his or her name not be disclosed to the alleged perpetrator or that the school not investigate or seek action against the alleged perpetrator, the school will need to determine whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence. As discussed in question C-3, the Title IX coordinator is generally in the best position to evaluate confidentiality requests. Because schools vary widely in size and administrative structure, OCR recognizes that a school may reasonably determine that an employee other than the Title IX coordinator, such as a sexual assault response coordinator, dean, or other school official, is better suited to evaluate such requests. Addressing the needs of a student reporting sexual violence while determining an appropriate institutional response requires expertise and attention, and a school should ensure that it assigns these responsibilities to employees with the capability and training to fulfill them. For example, if a school has a sexual assault response coordinator, that person should be consulted in evaluating requests for confidentiality. The school should identify in its Title IX policies and procedures the employee or employees responsible for making such determinations.

If the school determines that it can respect the student's request not to disclose his or her identity to the alleged perpetrator, it should take all reasonable steps to respond to the complaint consistent with the request. Although a student's request to have his or her name withheld may limit the school's ability to respond fully to an individual allegation of sexual violence, other means may be available to address the sexual violence. There are steps a school can take to limit the effects of the alleged sexual violence and prevent its recurrence without initiating formal action against the alleged perpetrator or revealing the identity of the student complainant. Examples include providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred; providing training and education materials for students and employees; changing and publicizing the school's policies on sexual violence; and conducting climate surveys regarding sexual violence. In instances affecting many students, an alleged perpetrator can be put on notice of allegations of harassing behavior and be counseled appropriately without revealing, even indirectly, the identity of the student complainant. A school must also take immediate action as necessary to protect the student while keeping the identity of the student confidential. These actions may include providing support services to the student and changing living arrangements or course schedules, assignments, or tests.

**E-2. What factors should a school consider in weighing a student's request for confidentiality?**

**Answer:** When weighing a student's request for confidentiality that could preclude a meaningful investigation or potential discipline of the alleged perpetrator, a school should consider a range of factors.

These factors include circumstances that suggest there is an increased risk of the alleged perpetrator committing additional acts of sexual violence or other violence (e.g., whether there have been other sexual violence complaints about the same alleged perpetrator, whether the alleged perpetrator has a history of arrests or records from a prior school indicating a history of violence, whether the alleged perpetrator threatened further sexual violence or other violence against the student or others, and whether the sexual violence was committed by multiple perpetrators). These factors also include circumstances that suggest there is an increased risk of future acts of sexual violence under similar circumstances (e.g., whether the student's report reveals a pattern of perpetration (e.g., via illicit use of drugs or alcohol) at a given location or by a particular group). Other factors that should be considered in assessing a student's request for confidentiality include whether the sexual violence was perpetrated with a weapon; the age of the student subjected to the sexual violence; and whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence).

A school should take requests for confidentiality seriously, while at the same time considering its responsibility to provide a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence. For example, if the school has credible information that the alleged perpetrator has committed one or more prior rapes, the balance of factors would compel the school to investigate the allegation of sexual violence, and if appropriate, pursue disciplinary action in a manner that may require disclosure of the student's identity to the alleged perpetrator. If the school determines that it must disclose a student's identity to an alleged perpetrator, it should inform the student prior to making this disclosure. In these cases, it is also especially important for schools to take whatever interim measures are necessary to protect the student and ensure the safety of other students. If a school has a sexual assault response coordinator, that person should be consulted in identifying safety risks and interim measures that are necessary to protect the student. In the event the student requests that the school inform the perpetrator that the student asked the school not to investigate or seek discipline, the school should honor this request and inform the alleged perpetrator that the school made the decision to go forward. For additional information on interim measures see questions G-1 to G-3. Any school officials responsible for

discussing safety and confidentiality with students should be trained on the effects of trauma and the appropriate methods to communicate with students subjected to sexual violence. See questions J-1 to J-3.

On the other hand, if, for example, the school has no credible information about prior sexual violence committed by the alleged perpetrator and the alleged sexual violence was not perpetrated with a weapon or accompanied by threats to repeat the sexual violence against the complainant or others or part of a larger pattern at a given location or by a particular group, the balance of factors would likely compel the school to respect the student's request for confidentiality. In this case the school should still take all reasonable steps to respond to the complaint consistent with the student's confidentiality request and determine whether interim measures are appropriate or necessary. Schools should be mindful that traumatic events such as sexual violence can result in delayed decisionmaking by a student who has experienced sexual violence. Hence, a student who initially requests confidentiality might later request that a full investigation be conducted.

**E-3. What are the reporting responsibilities of school employees who provide or support the provision of counseling, advocacy, health, mental health, or sexual assault-related services to students who have experienced sexual violence?**

**Answer:** OCR does not require campus mental-health counselors, pastoral counselors, social workers, psychologists, health center employees, or any other person with a professional license requiring confidentiality, or who is supervised by such a person, to report, without the student's consent, incidents of sexual violence to the school in a way that identifies the student. Although these employees may have responsibilities that would otherwise make them responsible employees for Title IX purposes, OCR recognizes the importance of protecting the counselor-client relationship, which often requires confidentiality to ensure that students will seek the help they need.

Professional counselors and pastoral counselors whose official responsibilities include providing mental-health counseling to members of the school community are not required by Title IX to report *any* information regarding an incident of alleged sexual violence to the Title IX coordinator or other appropriate school designee.<sup>26</sup>

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<sup>26</sup> The exemption from reporting obligations for pastoral and professional counselors under Title IX is consistent with the Clery Act. For additional information on reporting obligations under the Clery Act, see Office of Postsecondary Education, *Handbook for Campus Safety and Security Reporting* (2011), available at <http://www2.ed.gov/admins/lead/safety/handbook.pdf>. Similar to the Clery Act, for Title IX purposes, a pastoral counselor is a person who is associated with a religious order or denomination, is recognized by that religious

OCR recognizes that some people who provide assistance to students who experience sexual violence are not professional or pastoral counselors. They include all individuals who work or volunteer in on-campus sexual assault centers, victim advocacy offices, women's centers, or health centers ("non-professional counselors or advocates"), including front desk staff and students. OCR wants students to feel free to seek their assistance and therefore interprets Title IX to give schools the latitude not to require these individuals to report incidents of sexual violence in a way that identifies the student without the student's consent.<sup>27</sup> These non-professional counselors or advocates are valuable sources of support for students, and OCR strongly encourages schools to designate these individuals as confidential sources.

Pastoral and professional counselors and non-professional counselors or advocates should be instructed to inform students of their right to file a Title IX complaint with the school and a separate complaint with campus or local law enforcement. In addition to informing students about campus resources for counseling, medical, and academic support, these persons should also indicate that they are available to assist students in filing such complaints. They should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials. When a school knows or reasonably should know of possible retaliation by other students or third parties, including threats, intimidation, coercion, or discrimination (including harassment), it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and ensure his or her safety as necessary.

In order to identify patterns or systemic problems related to sexual violence, a school should collect aggregate data about sexual violence incidents from non-professional counselors or advocates in their on-campus sexual assault centers, women's centers, or

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order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition as a pastoral counselor. A professional counselor is a person whose official responsibilities include providing mental health counseling to members of the institution's community and who is functioning within the scope of his or her license or certification. This definition applies even to professional counselors who are not employees of the school, but are under contract to provide counseling at the school. This includes individuals who are not yet licensed or certified as a counselor, but are acting in that role under the supervision of an individual who is licensed or certified. An example is a Ph.D. counselor-trainee acting under the supervision of a professional counselor at the school.

<sup>27</sup> Postsecondary institutions should be aware that an individual who is counseling students, but who does not meet the Clery Act definition of a pastoral or professional counselor, is not exempt from being a campus security authority if he or she otherwise has significant responsibility for student and campus activities. See fn. 24.

health centers. Such individuals should report only general information about incidents of sexual violence such as the nature, date, time, and general location of the incident and should take care to avoid reporting personally identifiable information about a student. Non-professional counselors and advocates should consult with students regarding what information needs to be withheld to protect their identity.

**E-4. Is a school required to investigate information regarding sexual violence incidents shared by survivors during public awareness events, such as “Take Back the Night”?**

**Answer:** No. OCR wants students to feel free to participate in preventive education programs and access resources for survivors. Therefore, public awareness events such as “Take Back the Night” or other forums at which students disclose experiences with sexual violence are not considered notice to the school for the purpose of triggering an individual investigation unless the survivor initiates a complaint. The school should instead respond to these disclosures by reviewing sexual assault policies, creating campus-wide educational programs, and conducting climate surveys to learn more about the prevalence of sexual violence at the school. Although Title IX does not require the school to investigate particular incidents discussed at such events, the school should ensure that survivors are aware of any available resources, including counseling, health, and mental health services. To ensure that the entire school community understands their Title IX rights related to sexual violence, the school should also provide information at these events on Title IX and how to file a Title IX complaint with the school, as well as options for reporting an incident of sexual violence to campus or local law enforcement.

**F. Investigations and Hearings**

Overview

**F-1. What elements should a school’s Title IX investigation include?**

**Answer:** The specific steps in a school’s Title IX investigation will vary depending on the nature of the allegation, the age of the student or students involved, the size and administrative structure of the school, state or local legal requirements (including mandatory reporting requirements for schools working with minors), and what it has learned from past experiences.

For the purposes of this document the term “investigation” refers to the process the school uses to resolve sexual violence complaints. This includes the fact-finding investigation and any hearing and decision-making process the school uses to determine: (1) whether or not the conduct occurred; and, (2) if the conduct occurred, what actions

the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, which may include imposing sanctions on the perpetrator and providing remedies for the complainant and broader student population.

In all cases, a school's Title IX investigation must be adequate, reliable, impartial, and prompt and include the opportunity for both parties to present witnesses and other evidence. The investigation may include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing.<sup>28</sup> Furthermore, neither Title IX nor the DCL specifies who should conduct the investigation. It could be the Title IX coordinator, provided there are no conflicts of interest, but it does not have to be. All persons involved in conducting a school's Title IX investigations must have training or experience in handling complaints of sexual violence and in the school's grievance procedures. For additional information on training, see question J-3.

When investigating an incident of alleged sexual violence for Title IX purposes, to the extent possible, a school should coordinate with any other ongoing school or criminal investigations of the incident and establish appropriate fact-finding roles for each investigator. A school should also consider whether information can be shared among the investigators so that complainants are not unnecessarily required to give multiple statements about a traumatic event. If the investigation includes forensic evidence, it may be helpful for a school to consult with local or campus law enforcement or a forensic expert to ensure that the evidence is correctly interpreted by school officials. For additional information on working with campus or local law enforcement see question F-3.

If a school uses its student disciplinary procedures to meet its Title IX obligation to resolve complaints of sexual violence promptly and equitably, it should recognize that imposing sanctions against the perpetrator, without additional remedies, likely will not be sufficient to eliminate the hostile environment and prevent recurrence as required by Title IX. If a school typically processes complaints of sexual violence through its disciplinary process and that process, including any investigation and hearing, meets the Title IX requirements discussed above and enables the school to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, then the school may use that process to satisfy its Title IX obligations and does not need to conduct a separate Title IX investigation. As discussed in question C-3, the Title IX coordinator should review the disciplinary process

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<sup>28</sup> This answer addresses only Title IX's requirements for investigations. It does not address legal rights or requirements under the U.S. Constitution, the Clery Act, or other federal, state, or local laws.

to ensure that it: (1) complies with the prompt and equitable requirements of Title IX; (2) allows for appropriate interim measures to be taken to protect the complainant during the process; and (3) provides for remedies to the complainant and school community where appropriate. For more information about interim measures, see questions G-1 to G-3, and about remedies, see questions H-1 and H-2.

The investigation may include, but is not limited to, conducting interviews of the complainant, the alleged perpetrator, and any witnesses; reviewing law enforcement investigation documents, if applicable; reviewing student and personnel files; and gathering and examining other relevant documents or evidence. While a school has flexibility in how it structures the investigative process, for Title IX purposes, a school must give the complainant any rights that it gives to the alleged perpetrator. A balanced and fair process that provides the same opportunities to both parties will lead to sound and supportable decisions.<sup>29</sup> Specifically:

- Throughout the investigation, the parties must have an equal opportunity to present relevant witnesses and other evidence.
- The school must use a preponderance-of-the-evidence (*i.e.*, more likely than not) standard in any Title IX proceedings, including any fact-finding and hearings.
- If the school permits one party to have lawyers or other advisors at any stage of the proceedings, it must do so equally for both parties. Any school-imposed restrictions on the ability of lawyers or other advisors to speak or otherwise participate in the proceedings must also apply equally.
- If the school permits one party to submit third-party expert testimony, it must do so equally for both parties.
- If the school provides for an appeal, it must do so equally for both parties.
- Both parties must be notified, in writing, of the outcome of both the complaint and any appeal (see question H-3).

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<sup>29</sup> As explained in question C-5, the parties may have certain due process rights under the U.S. Constitution.

Intersection with Criminal Investigations**F-2. What are the key differences between a school's Title IX investigation into allegations of sexual violence and a criminal investigation?**

**Answer:** A criminal investigation is intended to determine whether an individual violated criminal law; and, if at the conclusion of the investigation, the individual is tried and found guilty, the individual may be imprisoned or subject to criminal penalties. The U.S. Constitution affords criminal defendants who face the risk of incarceration numerous protections, including, but not limited to, the right to counsel, the right to a speedy trial, the right to a jury trial, the right against self-incrimination, and the right to confrontation. In addition, government officials responsible for criminal investigations (including police and prosecutors) normally have discretion as to which complaints from the public they will investigate.

By contrast, a Title IX investigation will never result in incarceration of an individual and, therefore, the same procedural protections and legal standards are not required. Further, while a criminal investigation is initiated at the discretion of law enforcement authorities, a Title IX investigation is not discretionary; a school has a duty under Title IX to resolve complaints promptly and equitably and to provide a safe and nondiscriminatory environment for all students, free from sexual harassment and sexual violence. Because the standards for pursuing and completing criminal investigations are different from those used for Title IX investigations, the termination of a criminal investigation without an arrest or conviction does not affect the school's Title IX obligations.

Of course, criminal investigations conducted by local or campus law enforcement may be useful for fact gathering if the criminal investigation occurs within the recommended timeframe for Title IX investigations; but, even if a criminal investigation is ongoing, a school must still conduct its own Title IX investigation.

A school should notify complainants of the right to file a criminal complaint and should not dissuade a complainant from doing so either during or after the school's internal Title IX investigation. Title IX does not require a school to report alleged incidents of sexual violence to law enforcement, but a school may have reporting obligations under state, local, or other federal laws.

**F-3. How should a school proceed when campus or local law enforcement agencies are conducting a criminal investigation while the school is conducting a parallel Title IX investigation?**

**Answer:** A school should not wait for the conclusion of a criminal investigation or criminal proceeding to begin its own Title IX investigation. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, it is important for a school to understand that during this brief delay in the Title IX investigation, it must take interim measures to protect the complainant in the educational setting. The school should also continue to update the parties on the status of the investigation and inform the parties when the school resumes its Title IX investigation. For additional information on interim measures see questions G-1 to G-3.

If a school delays the fact-finding portion of a Title IX investigation, the school must promptly resume and complete its fact-finding for the Title IX investigation once it learns that the police department has completed its evidence gathering stage of the criminal investigation. The school should not delay its investigation until the ultimate outcome of the criminal investigation or the filing of any charges. OCR recommends that a school work with its campus police, local law enforcement, and local prosecutor's office to learn when the evidence gathering stage of the criminal investigation is complete. A school may also want to enter into a memorandum of understanding (MOU) or other agreement with these agencies regarding the protocols and procedures for referring allegations of sexual violence, sharing information, and conducting contemporaneous investigations. Any MOU or other agreement must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably, and must comply with the Family Educational Rights and Privacy Act ("FERPA") and other applicable privacy laws.

The DCL states that in one instance a prosecutor's office informed OCR that the police department's evidence gathering stage typically takes three to ten calendar days, although the delay in the school's investigation may be longer in certain instances. OCR understands that this example may not be representative and that the law enforcement agency's process often takes more than ten days. OCR recognizes that the length of time for evidence gathering by criminal investigators will vary depending on the specific circumstances of each case.

Off-Campus Conduct**F-4. Is a school required to process complaints of alleged sexual violence that occurred off campus?**

**Answer:** Yes. Under Title IX, a school must process all complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity.

A school must determine whether the alleged off-campus sexual violence occurred in the context of an education program or activity of the school; if so, the school must treat the complaint in the same manner that it treats complaints regarding on-campus conduct. In other words, if a school determines that the alleged misconduct took place in the context of an education program or activity of the school, the fact that the alleged misconduct took place off campus does not relieve the school of its obligation to investigate the complaint as it would investigate a complaint of sexual violence that occurred on campus.

Whether the alleged misconduct occurred in this context may not always be apparent from the complaint, so a school may need to gather additional information in order to make such a determination. Off-campus education programs and activities are clearly covered and include, but are not limited to: activities that take place at houses of fraternities or sororities recognized by the school; school-sponsored field trips, including athletic team travel; and events for school clubs that occur off campus (e.g., a debate team trip to another school or to a weekend competition).

Even if the misconduct did not occur in the context of an education program or activity, a school must consider the effects of the off-campus misconduct when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity because students often experience the continuing effects of off-campus sexual violence while at school or in an off-campus education program or activity. The school cannot address the continuing effects of the off-campus sexual violence at school or in an off-campus education program or activity unless it processes the complaint and gathers appropriate additional information in accordance with its established procedures.

Once a school is on notice of off-campus sexual violence against a student, it must assess whether there are any continuing effects on campus or in an off-campus education program or activity that are creating or contributing to a hostile environment and, if so, address that hostile environment in the same manner in which it would address a hostile environment created by on-campus misconduct. The mere presence on campus or in an

off-campus education program or activity of the alleged perpetrator of off-campus sexual violence can have continuing effects that create a hostile environment. A school should also take steps to protect a student who alleges off-campus sexual violence from further harassment by the alleged perpetrator or his or her friends, and a school may have to take steps to protect other students from possible assault by the alleged perpetrator. In other words, the school should protect the school community in the same way it would had the sexual violence occurred on campus. Even if there are no continuing effects of the off-campus sexual violence experienced by the student on campus or in an off-campus education program or activity, the school still should handle these incidents as it would handle other off-campus incidents of misconduct or violence and consistent with any other applicable laws. For example, if a school, under its code of conduct, exercises jurisdiction over physical altercations between students that occur off campus outside of an education program or activity, it should also exercise jurisdiction over incidents of student-on-student sexual violence that occur off campus outside of an education program or activity.

#### Hearings<sup>30</sup>

##### **F-5. Must a school allow or require the parties to be present during an entire hearing?**

**Answer:** If a school uses a hearing process to determine responsibility for acts of sexual violence, OCR does not require that the school allow a complainant to be present for the entire hearing; it is up to each school to make this determination. But if the school allows one party to be present for the entirety of a hearing, it must do so equally for both parties. At the same time, when requested, a school should make arrangements so that the complainant and the alleged perpetrator do not have to be present in the same room at the same time. These two objectives may be achieved by using closed circuit television or other means. Because a school has a Title IX obligation to investigate possible sexual violence, if a hearing is part of the school's Title IX investigation process, the school must not require a complainant to be present at the hearing as a prerequisite to proceed with the hearing.

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<sup>30</sup> As noted in question F-1, the investigation may include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing. Although Title IX does not dictate the membership of a hearing board, OCR discourages schools from allowing students to serve on hearing boards in cases involving allegations of sexual violence.

**F-6. May every witness at the hearing, including the parties, be cross-examined?**

**Answer:** OCR does not require that a school allow cross-examination of witnesses, including the parties, if they testify at the hearing. But if the school allows one party to cross-examine witnesses, it must do so equally for both parties.

OCR strongly discourages a school from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence. Allowing an alleged perpetrator to question a complainant directly may be traumatic or intimidating, and may perpetuate a hostile environment. A school may choose, instead, to allow the parties to submit questions to a trained third party (*e.g.*, the hearing panel) to ask the questions on their behalf. OCR recommends that the third party screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case.

**F-7. May the complainant's sexual history be introduced at hearings?**

**Answer:** Questioning about the complainant's sexual history with anyone other than the alleged perpetrator should not be permitted. Further, a school should recognize that the mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence. The school should also ensure that hearings are conducted in a manner that does not inflict additional trauma on the complainant.

**Timeframes****F-8. What stages of the investigation are included in the 60-day timeframe referenced in the DCL as the length for a typical investigation?**

**Answer:** As noted in the DCL, the 60-calendar day timeframe for investigations is based on OCR's experience in typical cases. The 60-calendar day timeframe refers to the entire investigation process, which includes conducting the fact-finding investigation, holding a hearing or engaging in another decision-making process to determine whether the alleged sexual violence occurred and created a hostile environment, and determining what actions the school will take to eliminate the hostile environment and prevent its recurrence, including imposing sanctions against the perpetrator and providing remedies for the complainant and school community, as appropriate. Although this timeframe does not include appeals, a school should be aware that an unduly long appeals process may impact whether the school's response was prompt and equitable as required by Title IX.

OCR does not require a school to complete investigations within 60 days; rather OCR evaluates on a case-by-case basis whether the resolution of sexual violence complaints is prompt and equitable. Whether OCR considers an investigation to be prompt as required by Title IX will vary depending on the complexity of the investigation and the severity and extent of the alleged conduct. OCR recognizes that the investigation process may take longer if there is a parallel criminal investigation or if it occurs partially during school breaks. A school may need to stop an investigation during school breaks or between school years, although a school should make every effort to try to conduct an investigation during these breaks unless so doing would sacrifice witness availability or otherwise compromise the process.

Because timeframes for investigations vary and a school may need to depart from the timeframes designated in its grievance procedures, both parties should be given periodic status updates throughout the process.

#### **G. Interim Measures**

##### **G-1. Is a school required to take any interim measures before the completion of its investigation?**

**Answer:** Title IX requires a school to take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. The school should take these steps promptly once it has notice of a sexual violence allegation and should provide the complainant with periodic updates on the status of the investigation. The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow the complainant to change academic and extracurricular activities or his or her living, transportation, dining, and working situation as appropriate. The school should also ensure that the complainant is aware of his or her Title IX rights and any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement. If a school does not offer these services on campus, it should enter into an MOU with a local victim services provider if possible.

Even when a school has determined that it can respect a complainant's request for confidentiality and therefore may not be able to respond fully to an allegation of sexual violence and initiate formal action against an alleged perpetrator, the school must take immediate action to protect the complainant while keeping the identity of the complainant confidential. These actions may include: providing support services to the

complainant; changing living arrangements or course schedules, assignments, or tests; and providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred.

**G-2. How should a school determine what interim measures to take?**

**Answer:** The specific interim measures implemented and the process for implementing those measures will vary depending on the facts of each case. A school should consider a number of factors in determining what interim measures to take, including, for example, the specific need expressed by the complainant; the age of the students involved; the severity or pervasiveness of the allegations; any continuing effects on the complainant; whether the complainant and alleged perpetrator share the same residence hall, dining hall, class, transportation, or job location; and whether other judicial measures have been taken to protect the complainant (*e.g.*, civil protection orders).

In general, when taking interim measures, schools should minimize the burden on the complainant. For example, if the complainant and alleged perpetrator share the same class or residence hall, the school should not, as a matter of course, remove the complainant from the class or housing while allowing the alleged perpetrator to remain without carefully considering the facts of the case.

**G-3. If a school provides all students with access to counseling on a fee basis, does that suffice for providing counseling as an interim measure?**

**Answer:** No. Interim measures are determined by a school on a case-by-case basis. If a school determines that it needs to offer counseling to the complainant as part of its Title IX obligation to take steps to protect the complainant while the investigation is ongoing, it must not require the complainant to pay for this service.

## H. Remedies and Notice of Outcome<sup>31</sup>

### H-1. What remedies should a school consider in a case of student-on-student sexual violence?

**Answer:** Effective remedial action may include disciplinary action against the perpetrator, providing counseling for the perpetrator, remedies for the complainant and others, as well as changes to the school's overall services or policies. All services needed to remedy the hostile environment should be offered to the complainant. These remedies are separate from, and in addition to, any interim measure that may have been provided prior to the conclusion of the school's investigation. In any instance in which the complainant did not take advantage of a specific service (*e.g.*, counseling) when offered as an interim measure, the complainant should still be offered, and is still entitled to, appropriate final remedies that may include services the complainant declined as an interim measure. A refusal at the interim stage does not mean the refused service or set of services should not be offered as a remedy.

If a school uses its student disciplinary procedures to meet its Title IX obligation to resolve complaints of sexual violence promptly and equitably, it should recognize that imposing sanctions against the perpetrator, without more, likely will not be sufficient to satisfy its Title IX obligation to eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. Additional remedies for the complainant and the school community may be necessary. If the school's student disciplinary procedure does not include a process for determining and implementing these remedies for the complainant and school community, the school will need to use another process for this purpose.

Depending on the specific nature of the problem, remedies for the complainant may include, but are not limited to:

- Providing an effective escort to ensure that the complainant can move safely between classes and activities;

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<sup>31</sup> As explained in question A-5, if a school delays responding to allegations of sexual violence or responds inappropriately, the school's own inaction may subject the student to be subjected to a hostile environment. In this case, in addition to the remedies discussed in this section, the school will also be required to remedy the effects of the sexual violence that could reasonably have been prevented had the school responded promptly and appropriately.

- Ensuring the complainant and perpetrator do not share classes or extracurricular activities;
- Moving the perpetrator or complainant (if the complainant requests to be moved) to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;
- Providing comprehensive, holistic victim services including medical, counseling and academic support services, such as tutoring;
- Arranging for the complainant to have extra time to complete or re-take a class or withdraw from a class without an academic or financial penalty; and
- Reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the sexual violence and the misconduct that may have resulted in the complainant being disciplined.<sup>32</sup>

Remedies for the broader student population may include, but are not limited to:

- Designating an individual from the school's counseling center who is specifically trained in providing trauma-informed comprehensive services to victims of sexual violence to be on call to assist students whenever needed;
- Training or retraining school employees on the school's responsibilities to address allegations of sexual violence and how to conduct Title IX investigations;
- Developing materials on sexual violence, which should be distributed to all students;
- Conducting bystander intervention and sexual violence prevention programs with students;
- Issuing policy statements or taking other steps that clearly communicate that the school does not tolerate sexual violence and will respond to any incidents and to any student who reports such incidents;

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<sup>32</sup> For example, if the complainant was disciplined for skipping a class in which the perpetrator was enrolled, the school should review the incident to determine if the complainant skipped class to avoid contact with the perpetrator.

- Conducting, in conjunction with student leaders, a campus climate check to assess the effectiveness of efforts to ensure that the school is free from sexual violence, and using that information to inform future proactive steps that the school will take;
- Targeted training for a group of students if, for example, the sexual violence created a hostile environment in a residence hall, fraternity or sorority, or on an athletic team; and
- Developing a protocol for working with local law enforcement as discussed in question F-3.

When a school is unable to conduct a full investigation into a particular incident (*i.e.*, when it received a general report of sexual violence without any personally identifying information), it should consider remedies for the broader student population in response.

**H-2. If, after an investigation, a school finds the alleged perpetrator responsible and determines that, as part of the remedies for the complainant, it must separate the complainant and perpetrator, how should the school accomplish this if both students share the same major and there are limited course options?**

**Answer:** If there are limited sections of required courses offered at a school and both the complainant and perpetrator are required to take those classes, the school may need to make alternate arrangements in a manner that minimizes the burden on the complainant. For example, the school may allow the complainant to take the regular sections of the courses while arranging for the perpetrator to take the same courses online or through independent study.

**H-3. What information must be provided to the complainant in the notice of the outcome?**

**Answer:** Title IX requires both parties to be notified, in writing, about the outcome of both the complaint and any appeal. OCR recommends that a school provide written notice of the outcome to the complainant and the alleged perpetrator concurrently.

For Title IX purposes, a school must inform the complainant as to whether or not it found that the alleged conduct occurred, any individual remedies offered or provided to the complainant or any sanctions imposed on the perpetrator that directly relate to the complainant, and other steps the school has taken to eliminate the hostile environment, if the school finds one to exist, and prevent recurrence. The perpetrator should not be notified of the individual remedies offered or provided to the complainant.

Sanctions that directly relate to the complainant (but that may also relate to eliminating the hostile environment and preventing recurrence) include, but are not limited to, requiring that the perpetrator stay away from the complainant until both parties graduate, prohibiting the perpetrator from attending school for a period of time, or transferring the perpetrator to another residence hall, other classes, or another school. Additional steps the school has taken to eliminate the hostile environment may include counseling and academic support services for the complainant and other affected students. Additional steps the school has taken to prevent recurrence may include sexual violence training for faculty and staff, revisions to the school's policies on sexual violence, and campus climate surveys. Further discussion of appropriate remedies is included in question H-1.

In addition to the Title IX requirements described above, the Clery Act requires, and FERPA permits, postsecondary institutions to inform the complainant of the institution's final determination and any disciplinary sanctions imposed on the perpetrator in sexual violence cases (as opposed to all harassment and misconduct covered by Title IX) not just those sanctions that directly relate to the complainant.<sup>33</sup>

## I. Appeals

### I-1. What are the requirements for an appeals process?

**Answer:** While Title IX does not require that a school provide an appeals process, OCR does recommend that the school do so where procedural error or previously unavailable relevant evidence could significantly impact the outcome of a case or where a sanction is substantially disproportionate to the findings. If a school chooses to provide for an appeal of the findings or remedy or both, it must do so equally for both parties. The specific design of the appeals process is up to the school, as long as the entire grievance process, including any appeals, provides prompt and equitable resolutions of sexual violence complaints, and the school takes steps to protect the complainant in the educational setting during the process. Any individual or body handling appeals should be trained in the dynamics of and trauma associated with sexual violence.

If a school chooses to offer an appeals process it has flexibility to determine the type of review it will apply to appeals, but the type of review the school applies must be the same regardless of which party files the appeal.

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<sup>33</sup> 20 U.S.C. § 1092(f) and 20 U.S.C. § 1232g(b)(6)(A).

**I-2. Must an appeal be available to a complainant who receives a favorable finding but does not believe a sanction that directly relates to him or her was sufficient?**

**Answer:** The appeals process must be equal for both parties. For example, if a school allows a perpetrator to appeal a suspension on the grounds that it is too severe, the school must also allow a complainant to appeal a suspension on the grounds that it was not severe enough. See question H-3 for more information on what must be provided to the complainant in the notice of the outcome.

**J. Title IX Training, Education and Prevention**<sup>34</sup>

**J-1. What type of training on Title IX and sexual violence should a school provide to its employees?**

**Answer:** A school needs to ensure that responsible employees with the authority to address sexual violence know how to respond appropriately to reports of sexual violence, that other responsible employees know that they are obligated to report sexual violence to appropriate school officials, and that all other employees understand how to respond to reports of sexual violence. A school should ensure that professional counselors, pastoral counselors, and non-professional counselors or advocates also understand the extent to which they may keep a report confidential. A school should provide training to all employees likely to witness or receive reports of sexual violence, including teachers, professors, school law enforcement unit employees, school administrators, school counselors, general counsels, athletic coaches, health personnel, and resident advisors. Training for employees should include practical information about how to prevent and identify sexual violence, including same-sex sexual violence; the behaviors that may lead to and result in sexual violence; the attitudes of bystanders that may allow conduct to continue; the potential for revictimization by responders and its effect on students; appropriate methods for responding to a student who may have experienced sexual violence, including the use of nonjudgmental language; the impact of trauma on victims; and, as applicable, the person(s) to whom such misconduct must be reported. The training should also explain responsible employees' reporting obligation, including what should be included in a report and any consequences for the failure to report and the procedure for responding to students' requests for confidentiality, as well as provide the contact

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<sup>34</sup> As explained earlier, although this document focuses on sexual violence, the legal principles apply to other forms of sexual harassment. Schools should ensure that any training they provide on Title IX and sexual violence also covers other forms of sexual harassment. Postsecondary institutions should also be aware of training requirements imposed under the Clery Act.

information for the school's Title IX coordinator. A school also should train responsible employees to inform students of: the reporting obligations of responsible employees; students' option to request confidentiality and available confidential advocacy, counseling, or other support services; and their right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement. For additional information on the reporting obligations of responsible employees and others see questions D-1 to D-5.

There is no minimum number of hours required for Title IX and sexual violence training at every school, but this training should be provided on a regular basis. Each school should determine based on its particular circumstances how such training should be conducted, who has the relevant expertise required to conduct the training, and who should receive the training to ensure that the training adequately prepares employees, particularly responsible employees, to fulfill their duties under Title IX. A school should also have methods for verifying that the training was effective.

**J-2. How should a school train responsible employees to report incidents of possible sexual harassment or sexual violence?**

**Answer:** Title IX requires a school to take prompt and effective steps reasonably calculated to end sexual harassment and sexual violence that creates a hostile environment (*i.e.*, conduct that is sufficiently serious as to limit or deny a student's ability to participate in or benefit from the school's educational program and activity). But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.

OCR therefore recommends that a school train responsible employees to report to the Title IX coordinator or other appropriate school official any incidents of sexual harassment or sexual violence that may violate the school's code of conduct or may create or contribute to the creation of a hostile environment. The school can then take steps to investigate and prevent any harassment or violence from recurring or escalating, as appropriate. For example, the school may separate the complainant and alleged perpetrator or conduct sexual harassment and sexual violence training for the school's students and employees. Responsible employees should understand that they do not need to determine whether the alleged sexual harassment or sexual violence actually occurred or that a hostile environment has been created before reporting an incident to the school's Title IX coordinator. Because the Title IX coordinator should have in-depth knowledge of Title IX and Title IX complaints at the school, he or she is likely to be in a better position than are other employees to evaluate whether an incident of sexual

harassment or sexual violence creates a hostile environment and how the school should respond. There may also be situations in which individual incidents of sexual harassment do not, by themselves, create a hostile environment; however when considered together, those incidents may create a hostile environment.

**J-3. What type of training should a school provide to employees who are involved in implementing the school's grievance procedures?**

**Answer:** All persons involved in implementing a school's grievance procedures (*e.g.*, Title IX coordinators, others who receive complaints, investigators, and adjudicators) must have training or experience in handling sexual violence complaints, and in the operation of the school's grievance procedures. The training should include information on working with and interviewing persons subjected to sexual violence; information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence; the proper standard of review for sexual violence complaints (preponderance of the evidence); information on consent and the role drugs or alcohol can play in the ability to consent; the importance of accountability for individuals found to have committed sexual violence; the need for remedial actions for the perpetrator, complainant, and school community; how to determine credibility; how to evaluate evidence and weigh it in an impartial manner; how to conduct investigations; confidentiality; the effects of trauma, including neurobiological change; and cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.

In rare circumstances, employees involved in implementing a school's grievance procedures may be able to demonstrate that prior training and experience has provided them with competency in the areas covered in the school's training. For example, the combination of effective prior training and experience investigating complaints of sexual violence, together with training on the school's current grievance procedures may be sufficient preparation for an employee to resolve Title IX complaints consistent with the school's grievance procedures. In-depth knowledge regarding Title IX and sexual violence is particularly helpful. Because laws and school policies and procedures may change, the only way to ensure that all employees involved in implementing the school's grievance procedures have the requisite training or experience is for the school to provide regular training to all individuals involved in implementing the school's Title IX grievance procedures even if such individuals also have prior relevant experience.

**J-4. What type of training on sexual violence should a school provide to its students?**

**Answer:** To ensure that students understand their rights under Title IX, a school should provide age-appropriate training to its students regarding Title IX and sexual violence. At the elementary and secondary school level, schools should consider whether sexual violence training should also be offered to parents, particularly training on the school's process for handling complaints of sexual violence. Training may be provided separately or as part of the school's broader training on sex discrimination and sexual harassment. However, sexual violence is a unique topic that should not be assumed to be covered adequately in other educational programming or training provided to students. The school may want to include this training in its orientation programs for new students; training for student athletes and members of student organizations; and back-to-school nights. A school should consider educational methods that are most likely to help students retain information when designing its training, including repeating the training at regular intervals. OCR recommends that, at a minimum, the following topics (as appropriate) be covered in this training:

- Title IX and what constitutes sexual violence, including same-sex sexual violence, under the school's policies;
- the school's definition of consent applicable to sexual conduct, including examples;
- how the school analyzes whether conduct was unwelcome under Title IX;
- how the school analyzes whether unwelcome sexual conduct creates a hostile environment;
- reporting options, including formal reporting and confidential disclosure options and any timeframes set by the school for reporting;
- the school's grievance procedures used to process sexual violence complaints;
- disciplinary code provisions relating to sexual violence and the consequences of violating those provisions;
- effects of trauma, including neurobiological changes;
- the role alcohol and drugs often play in sexual violence incidents, including the deliberate use of alcohol and/or other drugs to perpetrate sexual violence;
- strategies and skills for bystanders to intervene to prevent possible sexual violence;
- how to report sexual violence to campus or local law enforcement and the ability to pursue law enforcement proceedings simultaneously with a Title IX grievance; and
- Title IX's protections against retaliation.

The training should also encourage students to report incidents of sexual violence. The training should explain that students (and their parents or friends) do not need to determine whether incidents of sexual violence or other sexual harassment created a

hostile environment before reporting the incident. A school also should be aware that persons may be deterred from reporting incidents if, for example, violations of school or campus rules regarding alcohol or drugs were involved. As a result, a school should review its disciplinary policy to ensure it does not have a chilling effect on students' reporting of sexual violence offenses or participating as witnesses. OCR recommends that a school inform students that the school's primary concern is student safety, and that use of alcohol or drugs never makes the survivor at fault for sexual violence.

It is also important for a school to educate students about the persons on campus to whom they can confidentially report incidents of sexual violence. A school's sexual violence education and prevention program should clearly identify the offices or individuals with whom students can speak confidentially and the offices or individuals who can provide resources such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. It should also identify the school's responsible employees and explain that if students report incidents to responsible employees (except as noted in question E-3) these employees are required to report the incident to the Title IX coordinator or other appropriate official. This reporting includes the names of the alleged perpetrator and student involved in the sexual violence, as well as relevant facts including the date, time, and location, although efforts should be made to comply with requests for confidentiality from the complainant. For more detailed information regarding reporting and responsible employees and confidentiality, see questions D-1 to D-5 and E-1 to E-4.

#### **K. Retaliation**

##### **K-1. Does Title IX protect against retaliation?**

**Answer:** Yes. The Federal civil rights laws, including Title IX, make it unlawful to retaliate against an individual for the purpose of interfering with any right or privilege secured by these laws. This means that if an individual brings concerns about possible civil rights problems to a school's attention, including publicly opposing sexual violence or filing a sexual violence complaint with the school or any State or Federal agency, it is unlawful for the school to retaliate against that individual for doing so. It is also unlawful to retaliate against an individual because he or she testified, or participated in any manner, in an OCR or school's investigation or proceeding. Therefore, if a student, parent, teacher, coach, or other individual complains formally or informally about sexual violence or participates in an OCR or school's investigation or proceedings related to sexual violence, the school is prohibited from retaliating (including intimidating, threatening, coercing, or in any way

discriminating against the individual) because of the individual's complaint or participation.

A school should take steps to prevent retaliation against a student who filed a complaint either on his or her own behalf or on behalf of another student, or against those who provided information as witnesses.

Schools should be aware that complaints of sexual violence may be followed by retaliation against the complainant or witnesses by the alleged perpetrator or his or her associates. When a school knows or reasonably should know of possible retaliation by other students or third parties, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and witnesses and ensure their safety as necessary. At a minimum, this includes making sure that the complainant and his or her parents, if the complainant is in elementary or secondary school, and witnesses know how to report retaliation by school officials, other students, or third parties by making follow-up inquiries to see if there have been any new incidents or acts of retaliation, and by responding promptly and appropriately to address continuing or new problems. A school should also tell complainants and witnesses that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation, but will also take strong responsive action if it occurs.

#### **L. First Amendment**

##### **L-1. How should a school handle its obligation to respond to sexual harassment and sexual violence while still respecting free-speech rights guaranteed by the Constitution?**

**Answer:** The DCL on sexual violence did not expressly address First Amendment issues because it focuses on unlawful physical sexual violence, which is not speech or expression protected by the First Amendment.

However, OCR's previous guidance on the First Amendment, including the 2001 Guidance, OCR's July 28, 2003, Dear Colleague Letter on the First Amendment,<sup>35</sup> and OCR's October 26, 2010, Dear Colleague Letter on harassment and bullying,<sup>36</sup> remain fully in effect. OCR has made it clear that the laws and regulations it enforces protect students from prohibited discrimination and do not restrict the exercise of any expressive activities or speech protected under the U.S. Constitution. Therefore, when a school works to prevent

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<sup>35</sup> Available at <http://www.ed.gov/ocr/firstamend.html>.

<sup>36</sup> Available at <http://www.ed.gov/ocr/letters/colleague-201010.html>.

and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers.

Title IX protects students from sex discrimination; it does not regulate the content of speech. OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a hostile environment under Title IX. Title IX also does not require, prohibit, or abridge the use of particular textbooks or curricular materials.<sup>37</sup>

**M. The Clery Act and the Violence Against Women Reauthorization Act of 2013**

**M-1. How does the Clery Act affect the Title IX obligations of institutions of higher education that participate in the federal student financial aid programs?**

**Answer:** Institutions of higher education that participate in the federal student financial aid programs are subject to the requirements of the Clery Act as well as Title IX. The Clery Act requires institutions of higher education to provide current and prospective students and employees, the public, and the Department with crime statistics and information about campus crime prevention programs and policies. The Clery Act requirements apply to many crimes other than those addressed by Title IX. For those areas in which the Clery Act and Title IX both apply, the institution must comply with both laws. For additional information about the Clery Act and its regulations, please see <http://www2.ed.gov/admins/lead/safety/campus.html>.

**M-2. Were a school's obligations under Title IX and the DCL altered in any way by the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, including Section 304 of that Act, which amends the Clery Act?**

**Answer:** No. The Violence Against Women Reauthorization Act has no effect on a school's obligations under Title IX or the DCL. The Violence Against Women Reauthorization Act amended the Violence Against Women Act and the Clery Act, which are separate statutes. Nothing in Section 304 or any other part of the Violence Against Women Reauthorization Act relieves a school of its obligation to comply with the requirements of Title IX, including those set forth in these Questions and Answers, the 2011 DCL, and the *2001 Guidance*. For additional information about the Department's negotiated rulemaking related to the Violence Against Women Reauthorization Act please see <http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa.html>.

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<sup>37</sup> 34 C.F.R. § 106.42.

**N. Further Federal Guidance****N-1. Whom should I contact if I have additional questions about the DCL or OCR's other Title IX guidance?**

**Answer:** Anyone who has questions regarding this guidance, or Title IX should contact the OCR regional office that serves his or her state. Contact information for OCR regional offices can be found on OCR's webpage at <https://wdcrobcopl01.ed.gov/CFAPPS/OCR/contactus.cfm>. If you wish to file a complaint of discrimination with OCR, you may use the online complaint form available at <http://www.ed.gov/ocr/complaintintro.html> or send a letter to the OCR enforcement office responsible for the state in which the school is located. You may also email general questions to OCR at [ocr@ed.gov](mailto:ocr@ed.gov).

**N-2. Are there other resources available to assist a school in complying with Title IX and preventing and responding to sexual violence?**

**Answer:** Yes. OCR's policy guidance on Title IX is available on OCR's webpage at <http://www.ed.gov/ocr/publications.html#TitleIX>. In addition to the April 4, 2011, Dear Colleague Letter, OCR has issued the following resources that further discuss a school's obligation to respond to allegations of sexual harassment and sexual violence:

- Dear Colleague Letter: Harassment and Bullying (October 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>
- *Sexual Harassment: It's Not Academic* (Revised September 2008), <http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf>
- *Revised Sexual Harassment Guidance: Harassment of Students by Employees, Other Students, or Third Parties* (January 19, 2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>

In addition to guidance from OCR, a school may also find resources from the Departments of Education and Justice helpful in preventing and responding to sexual violence:

- Department of Education's Letter to Chief State School Officers on Teen Dating Violence Awareness and Prevention (February 28, 2013)  
<https://www2.ed.gov/policy/gen/guid/secletter/130228.html>
- Department of Education's National Center on Safe Supportive Learning Environments  
<http://safesupportivelearning.ed.gov/>
- Department of Justice, Office on Violence Against Women  
<http://www.ovw.usdoj.gov/>

U.S. Department of Education Releases List of Higher Education Institutions  
with Open Title IX Sexual Violence Investigations

This list reflects sexual violence investigations open at the postsecondary level including the dates the specific investigations were initiated. As of September 2, 2015 there are 155 sexual violence cases under investigation at 133 postsecondary institutions.

**Here are some of the schools from the Title IX sexual violence investigations. They are listed alphabetically by state:**

**Arizona**

- ARIZONA STATE UNIVERSITY - 1/26/2012

**California**

- BUTTE-GLENN COMMUNITY COLLEGE DISTRICT - 2/27/2013
- OCCIDENTAL COLLEGE - 5/2/2013
- UNIVERSITY OF CALIFORNIA-BERKELEY - Case 1: 3/25/2014, Case 2: 7/15/2015
- UNIVERSITY OF SOUTHERN CALIFORNIA - 6/26/2013
- CALIFORNIA INSTITUTE OF THE ARTS - 9/30/2014
- CHAPMAN UNIVERSITY - 7/27/2015
- SAN FRANCISCO STATE UNIVERSITY - 3/10/2015
- SAN JOSE-EVERGREEN COMMUNITY COLLEGE DISTRICT - 11/12/2014
- STANFORD UNIVERSITY - Case 1: 2/26/2015, Case 2: 5/28/2015
- UNIVERSITY OF CALIFORNIA-DAVIS - 3/24/2015
- UNIVERSITY OF CALIFORNIA-LOS ANGELES - 8/8/2014
- UNIVERSITY OF CALIFORNIA-SAN FRANCISCO - 5/6/2015
- UNIVERSITY OF CALIFORNIA-SANTA CRUZ - 3/13/2015

**Colorado**

- COLORADO STATE UNIVERSITY - 6/24/2014
- REGIS UNIVERSITY - 4/30/2013
- UNIVERSITY OF COLORADO AT BOULDER - 6/18/2013
- UNIVERSITY OF COLORADO AT DENVER - 4/29/2014
- UNIVERSITY OF DENVER - Case 1: 12/12/2013, Case 2: 3/10/2015

**Connecticut**

- UNIVERSITY OF CONNECTICUT - 2/17/2015

**Florida**

- FLORIDA STATE UNIVERSITY - 4/3/2014
- FULL SAIL UNIVERSITY - 7/20/2015

- UNIVERSITY OF SOUTH FLORIDA - 9/3/2014

#### Massachusetts

- AMHERST COLLEGE - 1/6/2014
- BERKLEE COLLEGE OF MUSIC - 6/19/2014
- BOSTON UNIVERSITY - 12/16/2013
- EMERSON COLLEGE - 12/23/2013
- HAMPSHIRE COLLEGE - 7/17/2014
- HARVARD COLLEGE - 4/24/2014
- NORTHEASTERN UNIVERSITY - 10/30/2014
- UNIVERSITY OF MASSACHUSETTS-AMHERST - 6/30/2011
- UNIVERSITY OF MASSACHUSETTS-DARTMOUTH - 7/16/2014

#### North Carolina

- GUILFORD COLLEGE - 11/18/2013
- UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL - 3/1/2013

#### New York

- BARNARD COLLEGE - 12/29/2014
- CANISIUS COLLEGE - 12/11/2014
- COLUMBIA UNIVERSITY - Case 1: 1/8/2015, Case 2: 7/30/2015
- CORNELL UNIVERSITY - 5/26/2015
- CUNY HUNTER COLLEGE - 2/8/2013
- ELMIRA COLLEGE - 5/12/2014
- HAMILTON COLLEGE - 11/14/2014
- HOBART AND WILLIAM SMITH COLLEGES - Case 1: 4/24/2014, Case 2: 8/10/2015
- NEW YORK UNIVERSITY SCHOOL OF MEDICINE - 7/16/2015
- PACE UNIVERSITY - NEW YORK - 7/22/2014
- POLYTECHNIC INSTITUTE OF NEW YORK UNIVERSITY - 5/22/2015
- SAINT THOMAS AQUINAS COLLEGE - 7/9/2014
- SARAH LAWRENCE COLLEGE - 12/4/2013
- ST. JOHN'S UNIVERSITY - 5/27/2015
- SUNY AT ALBANY UNIVERSITY - 6/16/2015
- SUNY AT STONY BROOK - 7/23/2014
- SUNY BUFFALO STATE COLLEGE - Case 1: 4/7/2015, Case 2: 3/26/2015
- SUNY COLLEGE AT BROCKPORT - 2/12/2015
- SUNY COLLEGE AT PURCHASE - 1/5/2015
- THE PRATT INSTITUTE - 8/26/2015
- UNIVERSITY OF ROCHESTER - 5/21/2015

#### Ohio

- DENISON UNIVERSITY - 3/7/2014
- CLEVELAND STATE UNIVERSITY - 8/31/2015

- OHIO STATE UNIVERSITY - 8/12/2015
- THE UNIVERSITY OF AKRON - 5/6/2014
- WITTENBERG UNIVERSITY - Case 1: 8/25/2011, Case 2: 4/18/2013

Texas

- CISCO JUNIOR COLLEGE - 5/7/2014
- TEXAS A&M UNIVERSITY - 3/18/2015
- THE UNIVERSITY OF TEXAS-PAN AMERICAN - 4/21/2014
- TRINITY UNIVERSITY - 7/31/2015

Virginia

- COLLEGE OF WILLIAM AND MARY - 4/18/2014
- JAMES MADISON UNIVERSITY - 6/4/2014
- UNIVERSITY OF RICHMOND - 6/12/2014
- UNIVERSITY OF VIRGINIA - 6/30/2011
- VIRGINIA COMMONWEALTH UNIVERSITY - 7/14/2015
- WASHINGTON AND LEE UNIVERSITY - 2/18/2015

Wisconsin

- UNIVERSITY OF WISCONSIN-MADISON - Case 1: 2/24/2015, Case 2: 8/12/2015
- UNIVERSITY OF WISCONSIN-WHITEWATER - 2/14/2014

## Intersection of Title IX and the Clery Act

The purpose of this chart is to clarify the reporting requirements of Title IX and the Clery Act in cases of sexual violence and to resolve any concerns about apparent conflicts between the two laws. To date, the Department of Education has not identified any specific conflicts between Title IX and the Clery Act.

| Title IX   | The Clery Act   |
|--|---|
| What types of incidents must be reported to school officials under Title IX and the Clery Act?   |   |
| <p><b>Overview:</b> Title IX promotes equal opportunity by providing that no person may be subjected to discrimination on the basis of sex under any educational program or activity receiving federal financial assistance. A school must respond promptly and effectively to sexual harassment, including sexual violence, that creates a hostile environment. When responsible employees know or should know about possible sexual harassment or sexual violence they must report it to the Title IX coordinator or other school designee.</p> <ul style="list-style-type: none"> <li>➤ <b>Sexual Harassment:</b> Sexual harassment is unwelcome conduct of a sexual nature, including unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.</li> <li>➤ <b>Sexual Violence:</b> Sexual violence is a form of sexual harassment. Sexual violence refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent (e.g., due to the student's age or use of drugs or alcohol or an intellectual or other disability that prevents the student from having the capacity to give consent). Sexual violence includes rape, sexual assault, sexual battery, sexual abuse, and sexual coercion.</li> </ul> | <p><b>Overview:</b> The Clery Act promotes campus safety by ensuring that students, employees, parents, and the broader community are well-informed about important public safety and crime prevention matters. Institutions that receive Title IV funds must disclose accurate and complete crime statistics for incidents that are reported to Campus Security Authorities (CSAs) and local law enforcement as having occurred on or near the campus. Schools must also disclose campus safety policies and procedures that specifically address topic such as sexual assault prevention, drug and alcohol abuse prevention, and emergency response and evacuation. The Clery Act also promotes transparency and ongoing communication about campus crimes and other threats to health and safety and empowers members to take a more active role in their own safety and security.</p> <p><b>Criminal Offenses:</b> Criminal homicide; rape and other sexual assaults; robbery; aggravated assault; burglary; motor vehicle theft; and, arson as well as arrests and disciplinary referrals for violations of drug, liquor, and weapons laws.</p> <ul style="list-style-type: none"> <li>➤ <b>Hate Crimes:</b> Any of the above-mentioned offenses against persons and property and incidents of larceny-theft, simple assault, intimidation or destruction/damage/vandalism of property, in which an individual or group is intentionally targeted because of their actual or perceived race, gender, religion, national origin, sexual orientation, gender identity, ethnicity, or disability. 20 U.S.C. §1092(f)(1)(F)(ii). Use FBI definitions, and the</li> </ul> |

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|   | <p>modifications from the Hate Crime Statistics Act. 20 U.S.C. §1092(f)(7).</p> <p>➤ <b>VAWA:</b> The reauthorization of the Violence Against Women Act of 1994 amended the Clery Act to include disclosure of statistics regarding incidents of dating violence, domestic violence, and stalking as defined in 20 U.S.C. §1092(f)(1)(F)(iii) and 20 U.S.C. §1092(f)(7).</p>   |
| <h3>Occurring where? (geography/jurisdiction)</h3>  |  |
| <p><b>Recipients must respond to sexual violence that occurs:</b></p> <p>➤ <b>In the context of a school's education programs and activities:</b> This includes academic, educational, extracurricular, athletic, and any other school programs, whether those programs take place in a school's facilities, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere. Additional examples include school-sponsored field trips, school-recognized fraternity or sorority houses, and athletic team travel; and events for school clubs that occur off campus.</p> <p>➤ <b>Off-campus:</b> Even if the sexual violence did not occur in the context of an educational program or activity, a school must process such complaints and consider the effects of the sexual violence when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity.</p> | <p><b>Institutions must disclose crime statistics for Clery-reportable offenses that occur on its so-called "Clery Geography." Clery Geography includes three general categories:</b></p> <p>➤ <b>Campus:</b> Any building or property that an institution owns or controls within a reasonably contiguous area that directly supports or relates to the institution's educational purposes. On campus also includes residence halls and properties the institution owns and students use for educational purposes that are controlled by another person (such as a food or retail vendor). The definition of "controlled" includes all such properties that are leased or borrowed and used for educational purposes. 20 U.S.C. §1092(f)(6)(ii)</p> <p>➤ <b>Non-campus building or property:</b> Any building or property that is owned or controlled by a recognized student organization. And, any building or property that is owned or controlled by the institution that is used in support of its educational purposes but is not located within a reasonably contiguous area to the campus. 20 U.S.C. §1092(f)(6)(iii).</p> <p>➤ <b>Public property:</b> All public property within the reasonably contiguous geographic area of the institution that is adjacent to or accessible from a facility the institution owns or controls and that is used for educational purposes. Examples include sidewalks, streets, and parking facilities. 20 U.S.C. §1092(f)(6)(iv).</p> |

| Who must report details of an incident of sexual violence, including personally identifiable information?  |  |
|--|--|
| <p><b>Responsible employees</b></p> <ul style="list-style-type: none"> <li>➤ A responsible employee is any employee who has the authority to take action to redress sexual violence, who has been given the duty to report to appropriate school officials about incidents of sexual violence or any other misconduct by students, or who a student could reasonably believe has this authority or responsibility.</li> <li>➤ Schools must make clear to all of its employees and students which staff members are responsible employees.</li> </ul>   | <p><b>Campus law enforcement officers, non-law enforcement campus safety officers, and local law enforcement officers</b></p> <ul style="list-style-type: none"> <li>➤ These individuals are normally required to fully document all operative facts of an incident that are reported or that are developed throughout the course of a criminal investigation. The information collected during such an investigation will normally include personally-identifiable information (PII).</li> </ul> <p><b>CSAs other than law enforcement/campus safety officers</b></p> <ul style="list-style-type: none"> <li>➤ Most of these CSAs are not typically required to disclose PII as part of their normal reporting obligations. (see CSA definition below)</li> </ul>   |
| Who can provide completely confidential support services to victims of sexual violence?  |  |
| <p><b>Professional and pastoral counselors</b></p> <ul style="list-style-type: none"> <li>➤ A professional counselor is a person whose official responsibilities include providing mental health counseling to members of the institution's community and who is functioning within the scope of his or her license or certification. This definition applies even to professional counselors who are not employees of the institution, but are under contract to provide counseling at the institution. This also includes an individual who is not yet licensed or certified as a counselor, but is acting in that role under the supervision of an individual who is licensed or certified. An example is a Ph.D. counselor-trainee acting under the supervision of a professional counselor at the institution.</li> <li>➤ A pastoral counselor is a person who is associated with a religious order or</li> </ul> | <p><b>Professional and pastoral counselors</b></p> <ul style="list-style-type: none"> <li>➤ A professional counselor is a person whose official responsibilities include providing mental health counseling to members of the institution's community and who is functioning within the scope of his or her license or certification. This definition applies even to professional counselors who are not employees of the institution, but are under contract to provide counseling at the institution. This also includes an individual who is not yet licensed or certified as a counselor, but is acting in that role under the supervision of an individual who is licensed or certified. An example is a Ph.D. counselor-trainee acting under the supervision of a professional counselor at the institution.</li> <li>➤ A pastoral counselor is a person who is associated with a religious order or</li> </ul> |

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| <p>denomination, is recognized by that religious order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition. In this context, a pastor or priest who is functioning as an athletic director or as a student advocate would not be exempt from the reporting obligations.</p> <p>➤ Professional and pastoral counselors are not required to report any information regarding an incident of alleged sexual violence. The exemption from reporting obligations for professional and pastoral counselors under Title IX is consistent with the Clery Act.</p> | <p>denomination, is recognized by that religious order or denominations as someone who provides confidential counseling, and is functioning within the scope of that recognition. In this context, a pastor or priest who is functioning as an athletic director or as a student advocate would not be exempt from the reporting obligations.</p> <p>➤ Crimes reported to a pastoral or professional counselor are not required to be reported by an institution under the Clery Act; however, institutions are strongly encouraged to establish voluntary, confidential reporting processes so that incidents of crime that are reported exclusively to professional and pastoral counselors will be included in the annual crime statistics. 34 C.F.R. §668.46(b)(2)(iii).</p> |
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**Who can provide services and keep personally identifiable information about incidents of sexual violence confidential?**

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| <p><b>Non-professional counselors or advocates</b></p> <ul style="list-style-type: none"> <li>➤ Individuals who are not professional or pastoral counselors, but work or volunteer in on-campus sexual assault centers, victim advocacy offices, women's centers, or health centers, including front desk staff and students, and provide assistance to students who experience sexual violence, should report aggregate data, but are not required to report, without the student's consent, incidents of sexual violence to the school in a way that identifies the student.</li> </ul> | <p><b>Most non-law enforcement/campus safety officers who are CSAs because of they have significant responsibilities for student and campus activities.</b></p> <ul style="list-style-type: none"> <li>➤ The definition of campus security authority includes campus police and/or security personnel; any individual who has responsibility for campus security but is not part of a campus police or security department; an individual or organization specified in an institution's statement of campus security policy as one to which students and employees should report criminal offenses; and an official of an institution who has a significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings. Most of these mandatory reporters are specifically not required by the Clery Act to disclose PII. 34 C.F.R. §668.46(a).</li> <li>➤ Because specific occupational titles, descriptions and statements of duties vary so significantly, each institution must conduct a substantive review of all of its officials, including students with official duties for example, resident assistants, and evaluate whether the Clery Act designates the individual a CSA and thereby confers reporting obligations. CSAs must be identified, notified of their reporting obligations, be properly training, and provided with a mechanism for communicating reported incidents to the appropriate officials. (Handbook, 75).</li> </ul> |
|---|--|

**What should non-professional counselors, advocates, and CSAs report about incidents of sexual violence?**

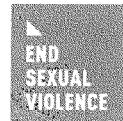
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| <p><b>Aggregate Data</b></p> <ul style="list-style-type: none"> <li>➤ In order to identify patterns or systemic problems related to sexual violence, a school should collect aggregate data about sexual violence incidents from non-professional counselors or advocates in their on-campus sexual assault centers, victim advocacy offices, women's centers, or health centers.</li> <li>➤ Such individuals should report only general information about incidents of sexual violence such as the nature, date, time, and general location of the incident and should take care to avoid reporting information that would personally identify a student. Non-professional counselors and advocates should consult with students regarding what information needs to be withheld to protect their identity.</li> </ul> | <p><b>Aggregate Data</b></p> <ul style="list-style-type: none"> <li>➤ Typically, most non-law enforcement/campus safety officer CSAs must only report the nature, date, time, general location, and the current disposition of the incident, if known.</li> <li>➤ Most non-law enforcement/campus safety officer CSAs typically are not required to disclose PII or other information that would have the effect of identifying the victim.</li> </ul>  |
| <p><b>Notice of the Outcome</b></p> <ul style="list-style-type: none"> <li>➤ Title IX requires a school to tell the complainant whether or not it found that the sexual violence occurred, any individual remedies offered or provided to the complainant or any sanctions imposed on the perpetrator that directly relate to the complainant, and other steps the school has taken to eliminate the hostile environment, and prevent recurrence.</li> <li>➤ Sanctions that directly relate to the complainant include, but are not limited to, requiring that the perpetrator stay away from the complainant until both parties graduate, prohibiting the perpetrator from attending</li> </ul>  | <p><b>Results of Institutional Disciplinary Proceedings</b></p> <ul style="list-style-type: none"> <li>➤ The Clery Act specifically mandates that "each institution shall develop and distribute procedures for simultaneously notifying the accuser and accused of the outcome of institutional disciplinary proceedings." 20 U.S.C. §485f(1)(J)(8)(B)(iv)(iii)(aa).</li> <li>➤ FERPA includes a provision that specifically allows schools to disclose to alleged victims of any crime of violence or rape and other sexual assaults, the final results of any disciplinary proceedings conducted by the institution against the alleged perpetrator of the offense. 20 U.S.C.</li> </ul> |

### What must a school tell the complainant about the outcome of a sexual violence complaint and how does FERPA apply?<sup>1</sup>

<sup>1</sup> This chart also addresses how the Family Educational Rights and Privacy Act (FERPA) applies to Title IX and the Clery Act. Once again, the Department of Education has not identified any specific situations where compliance with Title IX or the Clery Act will cause an institution to violate FERPA.

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| <p>school for a period of time or transferring the perpetrator to another residence hall, other classes, or another school.</p> <p>➤ The Department of Education interprets FERPA as not conflicting with the Title IX requirement that the school notify the complainant of the outcome of its investigation, <i>i.e.</i>, whether or not the sexual violence was found to have occurred, because this information directly relates to the victim.</p> <p>FERPA also permits the school to notify a complainant of sanctions imposed upon a student who was found to have engaged in sexual violence when the sanction directly relates to the complainant.</p> <p>➤ The FERPA limits on re-disclosure of information do not apply to information that institutions are required to disclose under the Clery Act. 34 C.F.R. §99.33(c). Institutions may not require a complainant to abide by a nondisclosure agreement, in writing, or otherwise, that would prevent the re-disclosure of this information in any Title IX complaint that involves a Clery Act offense, such as sexual violence.</p> | <p>§1232g(b)(6).</p> <p>➤ The “final results” of any proceeding are defined as: the name of the student, the findings of the proceeding board/official, any sanctions imposed by the institution, and the rationale for the findings and sanctions (if any). The presence of names of any other student, such as a victim or witnesses, may be included only with the consent of that student. 20 U.S.C. §1232g(c).</p> <p>➤ The FERPA limits on re-disclosure of information do not apply to information that institutions are required to disclose under the Clery Act. 34 C.F.R. §99.33(c). Institutions may not require a complainant to abide by a nondisclosure agreement, in writing, or otherwise, that would prevent the re-disclosure of this information.</p>  |
| <h3>How does FERPA apply to other obligations under Title IX and the Clery Act?</h3>   |   |
| <p><b>All Other Title IX Obligations</b></p> <p>➤ FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.</p>   | <p><b>Timely Warnings</b></p> <p>➤ The Clery Act requires institutions to issue timely warnings to the campus community about crimes that have already occurred but may continue to pose a serious or ongoing threat to students and employees. Timely warnings are only required for Clery-reportable crimes that occur on Clery Geography although institutions are encouraged to issue appropriate warnings regarding other criminal activity that may pose a serious threat as well. 20 U.S.C. §485f(1)(j)(3); Handbook, 118.</p> <p>➤ FERPA does not preclude an institution’s compliance with the timely warning provision of the Clery Act. FERPA recognizes that information can, in the case of an emergency, be released without consent when needed to protect the health and safety of others. 34 C.F.R. §99.36(a). Further, if</p> |

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|  | <p>institutions utilize information from the records of campus law enforcement to issue a timely warning, those records are not protected by FERPA. 20 U.S.C. §1232g(a)(4)(B)(ii).</p> <p>➤ However, timely warning reports must withhold the names and other identifying information about victims as confidential. 34 C.F.R. §668.46(e).</p> <p><u>Emergency Response Procedures</u></p> <p>➤ The Clery Act requires institutions to have and disclose emergency response and procedures. As part of these procedures, institutions must immediately notify the campus community about <i>any</i> significant emergency or dangerous condition that may pose an immediate threat to the health or safety of students or employees occurring on the campus. 20 U.S.C. §485f(1)(j)(1)(i).</p> <p>➤ An institution that follows its emergency notification procedures is not required to issue a timely warning based on the same circumstances; however, the institution must provide adequate follow-up information to the community as needed. 34 C.F.R. §668.46(e)(3).</p> <p>➤ FERPA recognizes that information can, in the case of an emergency, be released without consent when needed to protect the health and safety of others. 34 C.F.R. §99.36(a).</p> |
|--|---|



August 12, 2015

The Honorable Matt Salmon  
2349 Rayburn House Office Building  
Washington, DC 20515

The Honorable Pete Sessions  
2233 Rayburn House Office Building  
Washington, DC 20515

The Honorable Kay Granger  
1026 Longworth House Office Building  
Washington, DC 20515

Dear Representatives Salmon, Sessions, and Granger:

The National Alliance to End Sexual Violence (NAESV) is the voice in Washington for the 56 state and territorial sexual assault coalitions and 1300 rape crisis centers working to end sexual violence and support survivors. The Arizona Coalition to End Sexual and Domestic Violence is the statewide coalition representing sexual and domestic violence programs across the state of Arizona. The Texas Association Against Sexual Assault represents 82 rape crisis programs at 116 locations across Texas, which served more than 20,000 Texas victims last year. The local rape crisis centers in our networks see every day the widespread and devastating impacts of campus sexual assault upon survivors. College sexual assault survivors suffer high rates of PTSD, depression, and drug or alcohol abuse, which can hamper both their ability to succeed in school and future employment. At the same time, only a small percentage of these cases are reported, sanctioned by campus judicial boards, or prosecuted, allowing offenders to go without punishment as well as creating an unsafe environment for students.

We write to express our grave concern about *The Safe Campus Act of 2015*, H.R. 3403, and to apprise you of our opposition to this legislation. H.R. 3403 threatens to undermine the protections of Title IX and the critical progress policy makers, universities, advocates, students and survivors are making to end the scourge of sexual assault on campus.

Public policy responses to campus sexual violence must keep sight of supporting survivors and improving institutional climates so students can grow, learn and thrive. Every student has a right to an education free from sexual violence. In order to encourage educational attainment, we must expand options for survivors, rather than limit them. Sadly, some responsible for creating safe environments for students and responding to sexual assault claim they struggle to distinguish between assault and drunken, regrettable sex. We ask you to see this claim for the distraction that it is. In truth, the vast majority of sexual violence incidents are never reported to anyone in authority, either through the university or criminal justice systems. Furthermore, false reporting rates for sexual assault are low and consistent with other crimes.

Unfortunately, H.R. 3403 undermines the protections of Title IX and the Clery Act; puts students at risk of harm; and fails to hold institutions accountable for creating safe environments for young people. The Department of Education's Title IX sexual assault guidance and the Clery Act with Campus SaVE amendments are critically important tools to support survivors, increase institutional transparency, hold individual offenders accountable

National Alliance to End Sexual Violence

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and improve community safety. Recognizing that individual survivors find themselves in unique circumstances with varying and changing needs, Title IX requirements have developed to expand options and methods of support for survivors on campus. For many survivors, that includes a criminal justice response, and for many others it does not. In the same spirit of survivor trust and empowerment, the recent Campus SaVE amendments to the Clery Act require schools to inform survivors of their option to report to police, or not to report, and provide assistance and access to interim measures in either case. NAESV surveyed student survivors with Know Your IX in March 2015. Almost 90% of survivors responded “yes,” they should retain the choice whether and to whom to report. When asked their concerns if reporting to police were mandatory, 79% said, “this could have a chilling effect on reporting,” while 72% were concerned that “survivors would be forced to participate in the criminal justice system/go to trial.”

Recently, much has been made of schools’ authority to sanction students up to expulsion for sexual misconduct violations, based on a preponderance of the evidence presented in internal administrative hearings. We find this concern and conclusion unwarranted, question why the concern is raised specifically related to sexual assault determinations, and oppose provisions in H.R. 3403 to allow institutions to determine their own burden of proof and make the campus disciplinary process overly onerous. These are not criminal trials, and the preponderance standard is in keeping with other similar civil and administrative proceedings. Long before Title IX, colleges and universities exercised authority to sanction their students for policy violations, regardless of whether the conduct also constitutes a crime. Schools can suspend, expel, or impose a myriad of other sanctions for violations ranging from theft to drug use to physical assaults. But, unlike sexual misconduct, due process concerns are rarely raised in these cases. There is also ample legal precedent for administrative responses to sexual misconduct in non-educational settings. Under Title VII, employers—including colleges and universities—must conduct their own investigations of sexual harassment complaints and take remedial actions, often including terminating an employee found responsible for harassment.

Survivors must be informed of the avenues and procedures for reporting as well as advocacy assistance in making and following through with reports. Even so, some survivors will choose not to report to law enforcement, and we oppose provisions in your legislation that prevent institutions from responding appropriately when survivors choose not to engage the criminal justice process.

For those survivors who choose to report to law enforcement, we must acknowledge the fact that 5% or less of reported sexual assaults will be brought to trial. Yet your legislation suggests that this process be complete before institutions may act to protect students. Waiting for a case to go to trial will mean that perpetrators graduate without consequences, while survivors drop out of school to avoid contact with perpetrators. Again, criminal justice and campus proceedings are fundamentally different processes designed to address different problems and accomplish different goals. Campuses are obligated to determine whether or not a student violated school policy and to protect the civil rights of the victim. There is no reason to conflate the two responses or suggest that either fulfills the purpose of the other. It is dangerous to require that a trial occur before campuses contemplate disciplinary proceedings against those accused of sexual assault. Such a policy only places greater safety risks on the campus community, by failing to address harmful behaviors and policy violations perpetrated by fellow students.

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Ultimately, we hope we all share the same goal: to make campuses safer and to support students on campus with a fair process that adequately addresses policy violations. It is essential for campuses to provide a safe environment for learning for all students by rigorously investigating reported sexual assaults and proactively looking for patterns of perpetration. Your legislation seeks to undo many of the tools developed to help institutions fulfill this responsibility. For these reasons, we must respectfully oppose H.R. 3403. We would be happy to discuss our concerns with you.

Sincerely,

Monika Johnson Hostler  
President  
National Alliance to End Sexual Violence

Annette Burrhus Clay  
Executive Director  
Texas Association Against Sexual Assault

Allie Bones  
Executive Director  
Arizona Coalition to End Sexual and Domestic Violence

National Alliance to End Sexual Violence

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## FEMINIST MAJORITY FOUNDATION

*Working for Women's Equality*

September 10, 2015

The Honorable Virginia Foxx  
Chairwoman  
Subcommittee on Higher Education and Workforce Training  
Committee on Education and the Workforce  
United States House of Representatives

The Honorable Ruben Hinojosa  
Ranking Member  
Subcommittee on Higher Education and Workforce Training  
Committee on Education and the Workforce  
United States House of Representatives

**Re: Subcommittee on Higher Education & Workforce Training Hearing  
"Preventing and Responding to Sexual Assault on College Campuses"**

Dear Chairwoman Foxx, Ranking Member Hinojosa, and Members of the Subcommittee:

The Feminist Majority Foundation (FMF) is a national women's rights organization dedicated to eliminating sex discrimination and to the promotion of women's equality and empowerment in the United States and around the world. In addition to our Education Equality Program, FMF runs a Feminist Campus project, the largest feminist student and faculty network in the country, with student groups on hundreds of campuses in 34 states. These student-run groups, in conjunction with faculty advisors, focus on a myriad of feminist issues, including the elimination of campus sexual assault. Many of our groups are participating in university efforts to develop policies and procedures to help reduce sexual assault and violence on campus and to eliminate the hostile environments created by sexual harassment and assault.

We thank you for the opportunity to submit our views regarding efforts to combat sexual violence on college campuses and ask that this statement be entered into the record of the Subcommittee hearing entitled "Preventing and Responding to Sexual Assault on College Campuses," scheduled for Thursday, September 10, 2015.

As the Subcommittee is aware, sexual assault is an endemic problem on college campuses throughout the nation. One in five women students will experience a rape or attempted rape during her time in college,<sup>1</sup> and though less prevalent, male students are also at risk of sexual violence in college, where around one in sixteen will experience

<sup>1</sup> Washington Post-Kaiser Family Foundation Survey of College Students on Sexual Assault (2015), available at <http://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated/>; Christopher Krebs, et al., The Campus Sexual Assault (CSA) Study: Final Report (2007), prepared for National Institute of Justice available at <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

sexual assault.<sup>2</sup> Rape and sexual assault have long-term physical, psychological, and emotional consequences for survivors, and research has shown that sexual violence has a negative impact on educational attainment and imposes significant economic harm.<sup>3</sup> Combatting campus sexual assault is therefore of paramount importance, as sexual violence on campuses threatens to limit the educational and economic opportunities of survivors, most of whom are women.

Title IX of the Education Amendments of 1972, together with the Jeanne Clery Act, are critical tools helping students and schools address sexual assault on campus. Title IX, which prohibits discrimination on the basis of sex in federally-funded education programs and activities, obligates schools to take immediate and appropriate steps to investigate possible incidents of sexual assault on campus, determine what occurred, and, if necessary, take prompt and effective steps to remedy the situation, eliminate the hostile environment, and prevent its recurrence. Title IX protects all students from sex discrimination, including men and LGBTQ students, and helps to promote a safe and equitable educational environment.

The Clery Act, recently strengthened by the Campus Sexual Violence Elimination (Campus SaVE) Act, requires schools to create sexual violence prevention programs and clarifies schools' obligations to make survivors aware of their reporting options. Not all survivors of sexual violence will have the same response to trauma. It is therefore important that all survivors know how to make a confidential report of sexual violence, report to a responsible school employee, or report to the police. It is equally important, however, that schools investigate all reports of sexual violence in order to protect the civil rights of its students and ensure campus safety.

Over the past few years, students have increasingly used Title IX to bring attention to sexual assault on campus, and colleges and universities have used Title IX guidance issued by the Department of Education, Office for Civil Rights (OCR), to improve school policies and grievance procedures. Together, Title IX and the Clery Act have prompted many schools to implement prevention programs and bystander intervention trainings, to create Sexual Assault Response Teams, to devote more resources to victim services, and to strengthen the role of Title IX Coordinators.

The law has also empowered students to hold schools accountable for civil rights violations. Between FY2009 and FY2014, complaints to OCR involving sexual violence at institutions of higher education increased by more than 1,000 percent, yet OCR has not received an increase in funding necessary to investigate and resolve these complaints in a timely fashion, contributing to severe delays. The average length of a sexual violence investigation, for example, increased from 379 days in 2009 to 1,469 days in 2014.

OCR investigations have led to several voluntary resolution agreements that represent significant steps colleges and universities are willing to take toward reducing sexual

<sup>2</sup> Campus Sexual Assault Study, *supra* note 1.

<sup>3</sup> See National Alliance to End Sexual Violence, *Where We Stand: Costs, Consequences and Solutions*, available at <http://endsexualviolence.org/where-we-stand/costs-consequences-and-solutions>.

violence on their campuses. These agreements have included improvements to grievance procedures to make resolution of complaints prompt, fair, and equitable; increased training for school administrators; and better coordination of support services. These are positive steps towards creating a climate where sexual violence and assault are not tolerated and where student-survivors can receive the necessary support to continue with their education. Given the benefits of OCR enforcement of Title IX, it is imperative that OCR receive more funding and resources to perform its duties.

Title IX and the Clery Act have begun to produce tangible gains in the effort to address campus sexual assault and should be strengthened. **The Feminist Majority Foundation, therefore, supports legislation, like the Hold Accountable and Lend Transparency (HALT) Campus Sexual Violence Act (H.R. 2680),** which, among other things, would increase funding to OCR for Title IX investigators. The HALT Campus Sexual Violence Act would also promote accountability by requiring schools to conduct biennial climate surveys and by requiring public disclosure of: the list of institutions under investigation, the sanctions imposed (if any) or findings issued after investigation, and a copy of all program reviews and resolution agreements entered into between schools and the Department of Education.

**The Feminist Majority Foundation strongly opposes any efforts, such as the Safe Campus Act of 2015 (H.R. 3403), to weaken Title IX by curtailing the ability of schools to investigate and remedy sexual assault on campus.** In particular, H.R. 3403 would prevent schools from investigating an incident of sexual violence on campus unless a student allows a report of the incident to be made to a law enforcement agency. This measure is designed to drastically reduce the ability of schools to respond to sexual violence allegations at all. Only 12 percent of college-student survivors report to the police, with male survivors reporting at lower rates than women. The reasons for under-reporting are varied, but law enforcement has been notorious for failing to properly investigate allegations of sexual assault. Requiring reporting may also pose problems for students from communities with strained relationships with local police departments.

Further hampering schools' ability to protect students from sexual assault, even when a student does report to law enforcement, H.R. 3403 would prevent the school from initiating an investigation or disciplinary proceeding against the alleged perpetrator(s) until the law enforcement agency completes its investigation, a process that could take several months and sometimes years. This provision unduly delays efforts to comply with Title IX. The interests of the criminal justice system and the interests of a college or university, while sometimes aligned, is not the same. Schools wish to protect the safety of its students and its campus community, but it also must seek to remedy and prevent sex discrimination with respect to students' ability to participate in the school's educational programs. Blocking a school from fully addressing sexual violence complaints is therefore not only misguided, it undermines the intent and purpose of Title IX.

The Feminist Majority Foundation also strongly opposes efforts to change the standard of proof applied in school disciplinary proceedings. H.R. 3403 would allow schools to choose which standard of proof it will apply. Currently, schools apply a preponderance of

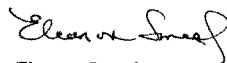
the evidence standard, a standard that is used in civil courts throughout the nation and is determined to be a fair standard that sufficiently protects the interests of all parties, even in high-stakes litigation. A higher standard of proof is used only in criminal cases, but disciplinary proceedings are not criminal trials, and no one's liberty is a stake. It is therefore inappropriate to apply a stricter standard of proof, which would only serve to make it more difficult for schools to enforce their sexual misconduct policies. H.R. 3403 could also result in some schools adopting standards that are more protective of the rights of survivors of sexual violence than others. Students, no matter where they attend school, should be able to rely on their schools' disciplinary proceedings to resolve sexual misconduct complaints fairly, using the same standard of proof available in other types of administrative hearings.

In order to effectively address campus sexual assault, schools must also be able to offer relief to survivors, remedies for the broader school community, and have the ability to impose meaningful sanctions against students who are found responsible for violations of school sexual misconduct policies. Too often, those found responsible receive inappropriate sanctions, including writing an essay or watching an educational video. Sanctions should be commensurate with the violation, and federal law should empower schools to take appropriate action to protect students and the school community. It is therefore counter-productive, and discriminatory, to create special rights for students found responsible for violating school sexual misconduct policies to sue colleges and universities if they are aggrieved by the school's decision to impose a sanction. Instead, schools should consider providing an internal appeals process, available equally to all parties, to address procedural errors, review sanctions that are disproportionate to the findings, or to consider previously unavailable evidence that could impact the findings.

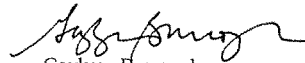
Title IX and the Clery Act are fundamental to efforts across the country to reduce sexual violence on college campuses. This is the time, as more students and parents are becoming aware of the problem and as schools are beginning to respond to the epidemic, to strengthen these critical tools and provide increased support for enforcement. Efforts to weaken or dismantle these laws would injure countless students, threaten the real progress that is being made on this issue, and by ignoring the reality of sexual violence and discrimination, injure colleges and universities in the long-run.

We look forward to working with policymakers to continue to develop strategies to further prevent and reduce sexual assault, and all forms of sex discrimination, on college campuses.

Sincerely,



Eleanor Smeal  
President



Gaylynn Burroughs  
Director of Policy & Research

Chairwoman FOXX. Without objection.

Mr. HINOJOSA. Thank you.

For my closing statement I would like to thank all of our witnesses for spending their time with us at this important hearing this morning.

A combination of publicity and heightened scrutiny is leading colleges across the entire nation to place more emphasis than ever on preventing and responding to sexual assault on their campuses. Sometimes victims of these horrendous crimes do not know who or where to turn because they believe no one will understand them or they believe that reporting a crime could bring them much more harm.

This is why it is imperative that institutions of higher education which deal directly with our students have the resources to provide the victims of sexual assault and the accused with help and comfort so that they and those affected by that crime will fully recover and not miss out on their educational opportunity.

And with that, I yield back.

Chairwoman FOXX. Thank you, Mr. Hinojosa.

Again, I want to thank our witnesses.

I want to thank everyone who came here today.

I especially want to thank our staff for the excellent work done on putting this hearing together.

And in the interest of time at the beginning I did not acknowledge that Dr. Rue is from Wake Forest, which is in my district, and I am very grateful to her and for that wonderful, wonderful institution that is there.

I want to say that I deplore violence of any kind. I don't even watch any kind of movies with violence in them because I cannot abide violence.

And this is a very important issue. It is important to all of us. Again, I have a grandson who went off to college this fall for the first time, so those of us in particular, again, who have children at colleges and universities, but every American, everybody on a college campus deserves to have a safe environment to learn. We want that for all of our students.

And so I believe that today's hearing has brought forth some important information that will inform us as we go forward in the reauthorization of the Higher Education Act, and I appreciate, again, the witnesses, my colleagues who came and asked very thoughtful questions, and everyone who is here to learn more about this issue.

There being no further business, the subcommittee stands adjourned.

[Additional submissions by Mr. Hinojosa]

**Congresswoman Jackie Speier's Statement for the Record**  
House Education and the Workforce Committee  
Subcommittee on Higher Education and Workforce Training  
Hearing "Preventing and Responding to Sexual Assault on College Campuses"  
Thursday, September 10, 2015

Thank you to Subcommittee Chairwoman Foxx, Subcommittee Ranking Member Hinojosa, Chairman Kline, Ranking Member Scott, and members of the Subcommittee on Higher Education and Workforce Training for letting me participate, and I commend the Committee for convening today to discuss such an important topic.

This week, students across the country are returning to their college campuses or—something I remember vividly with my own children—their parents are dropping them off in a dorm for the first time.

This should be an exciting time, but, unfortunately and unacceptably, it is also a dangerous time. Some university officials call the first six weeks after college starts in the fall

the “red zone”: A time when the incidence of sexual assault on campus is dramatically higher. The Justice Department found that 50% of sexual assaults on campus occur during this “red zone” between now and November, because students are meeting new people, adapting to new places, and engaging in new social activities that make them vulnerable to sexual violence.

Overall, it is estimated that 20% of young women and 6% of young men will be victims of attempted or actual sexual assault during their time at college.

I think we can all agree that these statistics are shameful.

We also know that the universities who are well aware of these statistics are failing to act. That is doubly shameful: The National Institute of Justice estimates that 63 percent of Universities shirk their legal responsibilities to respond to

these violent crimes. A recent Senate Committee report found that 21 percent of universities surveyed provide no sexual assault response training at all for members of their faculty and staff.

The fact is that rape is a crime. Period. Efforts to weaken Title IX and the Jeanne Clery Act – two landmark pieces of legislation passed by this body – are not the answer. Neither are efforts to force survivors to report.

What we need are laws, enforcement, and a culture that treat it that way. This includes educating our students about consent and healthy relationships, increasing transparency regarding processes and resources for both survivors and the accused, and making sure that universities uphold their responsibility to our keep students safe and free to pursue their education without fear of sexual harassment, discrimination, or sexual violence.

That's why I urge this Committee to consider the bipartisan bill I have introduced along with Congressman Pat Meehan, the Hold Accountable and Lend Transparency or HALT Campus Sexual Violence Act, to give survivors the justice they deserve.

The HALT Act would require and give the Department of Education the authority to issue fiscal penalties for civil rights violations under Title IX, something they don't have the power to do now, and would increase existing penalties for violating the Clery Act from \$35,000 to \$100,000. The bill also creates a private right of action under Clery for students whose institutions fail to inform them of safety risks and of their rights. The HALT Act would increase funding for investigators by \$5 million and help OCR to decrease the backlog of Title IX and Clery Act complaints. And it would also significantly increase transparency by requiring the Department of Education and the Department of justice to

make publically available a list of institutions under investigation, the sanctions (if any) or findings issued pursuant to such investigations, and program reviews and resolutions agreements entered into. The HALT Act does all of this without the need to reopen Title IX.

We must continue fighting until we can genuinely say something is different; until there is no “red zone,” or any pervasive risk of sexual assault on campus, and parents can drop off their kids for the fall semester without the fear that their young adult children will be sexually assaulted or abused.

Thank you.

The National Domestic Violence

**HOTLINE**

1.800.799.SAFE (7233) • 1.800.787.3224 (TTY)

September 24, 2015

The Honorable John Kline  
Chairman  
Committee on Education and the Workforce  
2181 Rayburn House Office Building  
Washington, DC 20515

The Honorable Robert C. "Bobby" Scott  
Ranking Member  
Committee on Education and the Workforce  
2101 Rayburn House Office Building  
Washington, DC 20515

The Honorable Virginia Foxx  
Chairwoman, Higher Education and Workforce  
Training  
2350 Rayburn House Office Building  
Washington, DC 20515

The Honorable Ruben Hinojosa  
Chairman, Higher Education and Workforce  
Training  
2262 Rayburn House Office Building  
Washington, DC 20515

Dear Chairmen Kline, Chairwoman Foxx and Ranking Members Scott and Hinojosa:

Thank you for the opportunity to comment on Congressional efforts to address sexual assault and related forms of violence on college campuses. We appreciate the committee's work on these issues and the thoughtful approach you are taking to gathering information.

The National Domestic Violence Hotline is the only national organization providing around-the-clock support for survivors of domestic and dating violence, their families, and friends. Last year we received nearly 400,000 contacts through phone, text, and chat. This year, we have already received 72,000 more contacts than at the same time in 2014. "Loveisrespect" is our program for teens and young adults, and through our web portal and digital services, we are reaching young people early in abusive relationships. We are also working on college campuses in Washington, DC to link student activist groups together to share best practices and strategies for combating dating violence. These initial recommendations to the Committee are informed by our direct connections with students and survivors.

**Focus on Dating Violence**

While much of the conversation about campus violence has focused on sexual assault, other forms of interpersonal violence are significant problems on college campuses. In one survey, 1 in 3 college women said they had been in an abusive dating relationship.<sup>i</sup> Overall, more than 50% of sexual assaults occur by current or former intimate partners.<sup>ii</sup> Dating violence also includes verbal abuse, physical assaults, cyber abuse, and obsessive jealousy that can lead to violence. The effects of dating violence on young women are significant: those who have experienced dating abuse have higher rates of substance abuse, risky sexual behavior, eating disorders, and other negative outcomes.<sup>iii</sup>

**Strengthen Education and Training**

Officials at Institutions of Higher Education (IHEs) must build their capacity to understand dating violence, its risk factors, indicators, and effects on student well-being and educational outcomes. Those adjudicating student disciplinary hearings should be trained to understand the steps victims take to protect themselves in dating relationships and the challenges involved in separating from an abusive partner. The training should also include information about perpetration and the appropriate methods of intervention. Without this background, adjudicators and other school

officials will not understand the steps they should take to hold perpetrators accountable and ensure victim safety. To improve their capacity, IHEs should partner with local domestic violence centers and community-based programs to assist with training for school officials and ensure that students have access to services and support. We also encourage Congress to provide resources to IHEs and local programs to build these partnerships at the community level.

The Violence Against Women Act (VAWA) 2013 amendments to the Clery Act and the subsequent implementing regulations require robust educational programs for students and employees about dating violence, domestic violence, sexual assault, and stalking.<sup>19</sup> While promising practices on college campuses have emerged in recent years, these efforts are not scaled up and many, if not most, schools will need additional resources and technical assistance to implement the new requirements. Federal agencies could be helpful, but only if collaboration is required between the Department of Education, the Department of Justice, and the Centers for Disease Control and Prevention. Each of these agencies has expertise and must work together to provide greater support to IHEs.

#### **Confidential Advisors and Peer Support**

Confidential support is critical to encouraging students who are experiencing dating violence to come forward and get the help they need. Survivors may be reluctant to report abusive partners to school officials or law enforcement and may need additional time and support to consider their options. We have heard from many students in dating relationships indicating that they are confused about what to do and that they don't have access to any services on campus. Confidential advisors should provide students with emotional support, information about their options for reporting, and referrals for more in-depth counseling services. Any student communications with the confidential advisors should *not* be made available to university staff or officials without the students' consent.

We also recommend that peer advocates be included among those who can serve as confidential advisors, as allowable by state laws governing the confidentiality of communications with volunteer counselors. Through our direct work with young adults, we have learned that they often respond best to their peers. Young people may fear being judged by adults and may not disclose the full extent of what has happened. Peers are able to build trust and relate more immediately to students. We also know that peer advocates must receive significant training and supervision by staff confidential advisors. We recommend that the Committee consider the possibility of including peer advocates in any provisions creating confidential advisors. We offer our expertise in peer advocacy and confidentiality if this would be helpful in considering these provisions.

#### **Oppose Mandatory Reporting**

While we agree that sexual assault in any setting requires an improved response from law enforcement, we also oppose mandatory reporting in most circumstances. Unless there is an immediate threat to public safety, mandatory reporting to law enforcement without the victim's consent can cause more harm than good. One of the most painful aspects of sexual violence is the loss of control and autonomy that the victim experiences during the assault. A key tenet of the immediate response should be to help victims re-establish control and security in their lives. Initiating a law enforcement investigation against the victim's wishes can expose him or her to additional trauma and loss of control.

In our experience, providing victims with support and information about their options is the best approach to restoring their sense of autonomy. This should be coupled with advocacy if the victim makes a report and is not being listened to or treated well by law enforcement. IHEs should actively assist victims who want to make a report to law enforcement and should provide ongoing support to students who may be interacting with the criminal justice system.

IHEs should also fulfill their obligations to victims under Title IX and the Clery Act regardless of the involvement of law enforcement. IHEs cannot abdicate their responsibilities to both hold students who violate conduct codes accountable and to provide the support necessary for victims to continue their education.

At the National Domestic Violence Hotline, we hear every day from college students who are experiencing violence and abuse. We appreciate the Committee's attention to this problem and offer our assistance as legislative efforts move forward.

If you need any additional information, please contact Lynn Rosenthal at 202-823-7464 or Rob Valente at 240-354-4842.

Sincerely,



Rob Valente  
Vice President of Public Policy



Lynn Rosenthal  
Vice President of Strategic Partnerships

<sup>i</sup>See 2011 College Dating and Abuse Poll, 11. Knowledge Networks Inc., (2011).

<sup>ii</sup>See 2010 National Intimate Partner and Sexual Violence Survey, 21. Center for Disease Control, (2010).

<sup>iii</sup>See Dating Violence Against Adolescent Girls and Associated Substance Use, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality. Journal of the American Medical Association, (2001).

<sup>iv</sup>See 79 F.R. 62751, 34 C.F.R. 668





**National Coalition For Men Carolinas (NCFMC)**

September 10, 2015

Chairwoman Virginia Foxx  
 Ranking Member Ruben Hinojosa  
 U.S. House Committee on Education and the Workforce Subcommittee on Higher  
 Education and Workforce Training  
 2181 Rayburn House Office Building  
 Washington, D.C. 20515

Re: Statement for the Record by the National Coalition For Men Carolinas (NCFMC) for  
 U.S. House Committee on Education and Workforce Hearing, "Preventing and  
 Responding to Sexual Assault on College Campuses"

Dear Chairwoman Foxx and Ranking Member Hinojosa:

Thank you for conducting a hearing on campus sexual assault. Speaking as a father of two college students, as a board member of the National Coalition For Men (NCFM), the oldest and largest men's human rights organization in the country and as the president of the Carolinas chapter of NCFM, I am deeply invested in this issue and ask this committee to provide a much needed, balanced examination in regard to the handling of sexual assault on our nation's college campuses.

Sexual assault is a serious matter, yet the heavy-handed treatment prescribed by the Department of Education is worse than the disease because it vitiates the presumption of innocence, nullifies equal treatment as provided by the 14th Amendment and denies due process to the accused.

We believe that institutions of higher education should be encouraged to provide education programs designed to address sexual violence that, at a minimum, provide training for reporting covered allegations, intervening as a bystander, and fostering development of healthy relationships.

NCFMC deplores rape and sexual assault, but we cannot close our eyes to the horror stories of young men caught up in a Kafkaesque disciplinary system in which the accused are presumed guilty and have no effective means to defend themselves. Have we forgotten the painful lessons learned at the expense of so many college men falsely accused of rape? Remember Duke University and the University of Virginia incidences of false accusations and the lives they destroyed?

There are many other cases of college men who have been falsely accused, removed from campus, denied due process, and ultimately harmed by the lack of due process. Caleb Warner (Univ. of North Dakota), Ethan Peloe (Univ. of Cincinnati), Jordan Lynch (Univ. of Montana), Joshua Strange (Auburn Univ.), Dez Wells (Xavier), Lewis McLeod (Duke Univ.), with the list growing. And the biased "guilty until proven innocent"



### National Coalition For Men Carolinas (NCFMC)

treatment that colleges often direct at the accused have and will continue to cost universities and governmental agencies millions of dollars in damages and legal fees.

Universities are not the proper institution to prosecute a rape case and if they were, they would need to rely on a proof beyond a reasonable doubt or by clear and convincing evidence standard, as opposed to the lenient "preponderance of the evidence" standard promulgated by the DOE.

In that regard, I would call attention to the testimony provided to Congress last year by Molly Corbett Broad, President of the American Council on Education, who stated:

*"Conducting education and providing information is an area where college officials have vast experience. We must redouble our education efforts on sexual assault, and as I noted earlier, institutions are moving aggressively to do this. But performing investigations and adjudicating cases is a far more difficult challenge. We lack the authority to subpoena witnesses, control evidence and impose legal standards. Our disciplinary and grievance procedures were designed to provide appropriate resolution of institutional standards for student conduct, especially with respect to academic matters. They were never meant for misdemeanors, let alone felonies. While we take our obligations to the victims/survivors of sexual assault very seriously and are fully aware of our responsibilities with respect to sexual assaults, **our on campus disciplinary processes are not proxies for the criminal justice system, nor should they be.**"*

Additionally, colleges are subject to burdensome and conflicting regulations regarding their handling of student discipline. Too many families have experienced college officials who did not understand their own roles or the rules governing disciplinary proceedings, and this is less attributable to their training than to the scope of what colleges are being asked to do. Under current regulations, colleges are asked to serve as, a support structure for students claiming to have been victimized, an arbiter of fairness and equal access to education, and a fact-finding and punitive system operating in parallel to criminal courts. These roles are contradictory and unsustainable.

We need to get serious about holding sexual offenders accountable without destroying the lives of the wrongly accused, but one size does not fit all. We need more discussion about how to process offenses like inappropriate touching versus rape. There may be instances in which school disciplinary procedures may be more appropriate than involving law enforcement, but not if the disciplinary procedures lack safeguards to protect the rights of the accused as well as the complainant.

In the absence of clear and well-balanced policies to determine which offenses are most appropriate for school discipline versus law enforcement, legislation aimed at improving campus safety should go beyond requiring universities to sign memorandums of understanding with local law enforcement. It should require that sexual assault



### **National Coalition For Men Carolinas (NCFMC)**

allegations be referred to local law enforcement and schools defer any investigation or adjudication until after law enforcement has completed its investigation. That is why we support H.R. 3403 – the Safe Campus Act and call on members of Congress to do likewise.

Furthermore, during the period in which a law enforcement agency is investigating a covered allegation reported by an institution, the institution should not initiate or otherwise carry out any institutional disciplinary proceeding with respect to the allegation, except to the extent that the institution may impose interim sanctions including no contact orders, adjustments of class schedules, or changes in housing assignments.

If colleges are going to continue down the path of adjudicating sexual assault allegations, then schools must provide meaningful due process to the accused to include the right to: (1) have counsel present and engaged during the entire process hearing, (2) effectively cross-examine their accuser, witnesses, and other relevant persons, (3) have timely and complete access to complaints, charges, and evidence, and (4) have complete freedom to talk with all involved parties and introduce exculpatory evidence. Congress could greatly improve the reliability and fairness of campus disciplinary hearings by requiring institutions to allow student complainants and accused students to have legal representation actively participate in those proceedings.

In closing, please do not dismiss the voices of the falsely accused and those advocating for an equitable solution to such a complex issue. Universities should have policies that enable victims of sexual assault to feel safe and secure in their reporting while being fair in the treatment to both accuser and accused. A good place to start would be by restoring a presumption of innocence in the handling of such deeply intrusive and complex matters.

Your work will shape the future of how sexual assault is handled in education and we are grateful that you have an interest in hearing another side to this complex issue; a side that often has no voice but is equally important to the national discussion on addressing sexual assault on college campuses.

Respectfully,

Gregory J. Josefchuk  
President  
National Coalition For Men Carolinas (NCFMC)  
Tel: (704) 980-4175  
[www.ncfmc Carolinas.com](http://www.ncfmc Carolinas.com)

[Questions submitted for the record and their responses follow:]176-179



COMMITTEE ON EDUCATION  
AND THE WORKFORCE  
U.S. HOUSE OF REPRESENTATIVES  
2181 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6100

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ALMA S. ADAMS, NORTH CAROLINA  
MARK DELSAULNIER, CALIFORNIA

October 6, 2014

Dr. Penny Rue  
Vice President for Campus Life  
Wake Forest University  
1834 Wake Forest Road  
P.O. Box 7374  
Winston-Salem, NC 27106

Dear Dr. Rue:

Thank you for testifying before the Subcommittee on Higher Education and Workforce Training at the hearing entitled, "Preventing and Responding to Sexual Assault on College Campuses" on Thursday, September 10, 2015. I appreciate your participation.

I have enclosed additional questions for inclusion in the final hearing record. Please provide a written response **no later than October 20, 2015**. Responses should be sent to Alex Ricci of the committee staff who can be contacted at (202) 225-6558.

Thank you again for your important contribution to the work of the committee.

Sincerely,

*Virginia Foxx*

Virginia Foxx  
Chairwoman  
Subcommittee on Higher Education  
and Workforce Training

**Congressman Bradley Byrne (R-AL)**

- University officials have stressed to me and my staff that institutional disciplinary processes are designed to handle academic matters like plagiarism, not to investigate and adjudicate felony offenses like sexual assault. It appears that regulations mandating that institutions investigate these crimes themselves are effectively an unfunded mandate that drive institutions to hire outside experts to perform investigations. To this end, a recent study by Vanderbilt University found that institutions encounter significant costs to conduct investigations of alleged sexual misconduct and comply with Title IX. Moreover, it is clear that these costs directly contribute to the need for institutions to increase tuition.

Given our shared interest in reducing costs for students, do you agree that existing regulations run counter to the Department of Education's stated desire to limit college costs so that all qualified students can access a world-class education? If so, do you agree that alleged cases of sexual assault are better handled by law enforcement with the existing capacity to investigate and adjudicate these crimes?

- We all agree that it is essential to prevent sexual assaults on college campuses. However, both of your prepared testimonies discuss the multi-layered, and sometimes duplicative, regulations that universities are subject to as they investigate alleged sexual assaults. As I understand it, many of the existing regulations placed upon institutions have resulted from closed rulemaking processes that offered little or no opportunity for input from institutions. Do you have suggestions for ways to increase the efficiency of the system through which institutions investigate sexual assaults, and specifically, can you talk about the importance of institutional engagement in the development of such regulations?
- Institutions from across the country, private and public, large and small, have expressed concern with the current system for investigating and adjudicating sexual assaults on college campuses. Specifically, institutions are expected to investigate reported assaults, render decisions, hear appeals and deliver punishments upon a finding of guilt. In essence, universities are required to act as judge, jury, and executioner when some believe that their campus justice systems are poorly equipped to handle these types of cases. First, would you agree with this sentiment and, if so, can you provide examples from experiences at your own institutions where the university was not best suited to investigate an alleged assault? And second, do you believe that investigations into reported campus sexual assaults are better handled by outside law enforcement that has more robust resources to conduct such investigations? I would welcome your thoughts on how the current process could be improved.
- I have also heard concerns that institutions feel threatened by the prospect of harsh repercussions from the Department of Education's Office of Civil Rights if investigations into reported sexual assaults do not yield guilty verdicts. Have you felt the same pressures at your respective institutions and do you believe that the specter of lost federal funding impacts institutions' decision making when investigating reported sexual assaults on campus?



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MARK DELSAULNIER, CALIFORNIA

October 6, 2014

Ms. Dana Scaduto  
General Counsel  
Dickinson College  
P.O. Box 1773  
Carlisle, PA 17013

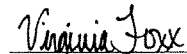
Dear Ms. Scaduto:

Thank you for testifying before the Subcommittee on Higher Education and Workforce Training at the hearing entitled, "Preventing and Responding to Sexual Assault on College Campuses" on Thursday, September 10, 2015. I appreciate your participation.

I have enclosed additional questions for inclusion in the final hearing record. Please provide a written response **no later than October 20, 2015**. Responses should be sent to Alex Ricci of the committee staff who can be contacted at (202) 225-6558.

Thank you again for your important contribution to the work of the committee.

Sincerely,

  
Virginia Foxx  
Chairwoman  
Subcommittee on Higher Education  
and Workforce Training

**Congressman Bradley Byrne (R-AL)**

- University officials have stressed to me and my staff that institutional disciplinary processes are designed to handle academic matters like plagiarism, not to investigate and adjudicate felony offenses like sexual assault. It appears that regulations mandating that institutions investigate these crimes themselves are effectively an unfunded mandate that drive institutions to hire outside experts to perform investigations. To this end, a recent study by Vanderbilt University found that institutions encounter significant costs to conduct investigations of alleged sexual misconduct and comply with Title IX. Moreover, it is clear that these costs directly contribute to the need for institutions to increase tuition.

Given our shared interest in reducing costs for students, do you agree that existing regulations run counter to the Department of Education's stated desire to limit college costs so that all qualified students can access a world-class education? If so, do you agree that alleged cases of sexual assault are better handled by law enforcement with the existing capacity to investigate and adjudicate these crimes?

- We all agree that it is essential to prevent sexual assaults on college campuses. However, both of your prepared testimonies discuss the multi-layered, and sometimes duplicative, regulations that universities are subject to as they investigate alleged sexual assaults. As I understand it, many of the existing regulations placed upon institutions have resulted from closed rulemaking processes that offered little or no opportunity for input from institutions. Do you have suggestions for ways to increase the efficiency of the system through which institutions investigate sexual assaults, and specifically, can you talk about the importance of institutional engagement in the development of such regulations?
- Institutions from across the country, private and public, large and small, have expressed concern with the current system for investigating and adjudicating sexual assaults on college campuses. Specifically, institutions are expected to investigate reported assaults, render decisions, hear appeals and deliver punishments upon a finding of guilt. In essence, universities are required to act as judge, jury, and executioner when some believe that their campus justice systems are poorly equipped to handle these types of cases. First, would you agree with this sentiment and, if so, can you provide examples from experiences at your own institutions where the university was not best suited to investigate an alleged assault? And second, do you believe that investigations into reported campus sexual assaults are better handled by outside law enforcement that has more robust resources to conduct such investigations? I would welcome your thoughts on how the current process could be improved.
- I have also heard concerns that institutions feel threatened by the prospect of harsh repercussions from the Department of Education's Office of Civil Rights if investigations into reported sexual assaults do not yield guilty verdicts. Have you felt the same pressures at your respective institutions, and do you believe that the specter of lost federal funding impacts institutions' decision making when investigating reported sexual assaults on campus?

[Responses to questions submitted or the record follow:]



Penny Rue, PhD  
Vice President

October 20, 2015

**Question 1: Given our shared interest in reducing costs for students, do you agree that existing regulations run counter to the Department of Education's stated desire to limit college costs so that all qualified students can access a world-class education? If so, do you agree that alleged cases of sexual assault are better handled by law enforcement with the existing capacity to investigate and adjudicate these crimes?**

On matters of sexual assault, our shared interest is to establish campus processes that are trauma-informed as well as fair and equitable to all parties involved. Students who are victims of sexual assault should have the option to pursue a criminal process through local law enforcement, if they so choose. But we must also acknowledge that some survivors of sexual violence may not want to report to local law enforcement. Instead, some may want to report on campus and/or receive campus-based support services. Further, we must also acknowledge that the criminal court system rarely finds an outcome that is favorable to victims of sexual violence. Knowing that the only prospect for safety is through a court system that too often fails to deliver a positive outcome inserts the very real threat that victims will be coerced out of reporting. As such, the establishment of local law enforcement's sole authority to investigate and adjudicate an allegation of sexual violence would undermine campus' responsibilities to establish educational environments that are fair and equitable to all students.

On matters of cost, our concerns are not related to establishing and following processes that are trauma-informed as well as fair and equitable to all parties involved. Our concerns are related to legal and regulatory requirements that add considerable costs without adding value to our ability to prevent and address sexual assaults on campus. Often, we must navigate substantial distance between guidance by the U.S. Department of Education's Office for Civil Rights and the resource infrastructure of our campuses. Requirements for additional reporting, coupled with recommendations for personnel infrastructure, are cost prohibitive for many colleges and universities.

**Question 2: Do you have suggestions for ways to increase the efficiency of the system through which institutions investigate sexual assaults, and specifically, can you talk about the importance of institutional engagement in the development of such regulations?**

It is critically important to recognize that the entire process to investigate and resolve an allegation of sexual assault is complex. Many times, reports are made weeks or months after the occurrence. Often, there are no witnesses to the incident, and alcohol or other drugs may be a factor in the alleged incident. With this complexity in mind, professionals who handle allegations of sexual assault on campus have obligations to maintain processes that are fair and equitable to all parties involved. To this end, campus processes must allow for flexibility to investigate an allegation of sexual assault in a timely, fair, and equitable manner.

It is imperative that campus processes allow for professionals to take interim protective measures in cases where alleged victims and the accused occupy shared space on campus. It is also critically important that victims, not campuses or local law enforcement agencies, maintain responsibility for deciding whether and how to proceed following a sexual assault, and that campuses be able to support victims however they choose. It is important that campuses maintain control of the conduct process because this responsibility enables trained campus professionals to uphold our duty under federal law to ensure equal educational opportunity for all students.

The student conduct process is not a court of law. The campus conduct system should not replicate the court system because the aims of each are vastly different. Campus processes are educational and designed to arrive at a fair and equitable outcome for all parties. At its core, our processes are designed to affirm our obligation under Title IX to use preponderance of the evidence as the standard of scrutiny in determining responsibility for accusations of sexual assault—not the more rigorous standard to prove guilt beyond a reasonable doubt.

From a regulatory standpoint, we welcome conversation and partnership with the United States Department of Education to establish a mutual, rather than an imposed, process for complying with legal and regulatory obligations. What can work is when stakeholders come together to establish workable solutions on matters of shared interest. A recent example of this approach is the negotiated rulemaking process for the Campus SaVe Act provisions of the VAWA reauthorization. Too often, however, the U.S. Department of Education's Office for Civil Rights publishes guidance without the opportunity for comment. Further, this guidance often addresses subject matter that would require substantive change to campus approaches to comply with federal law and regulation. This informal approach to regulation, imposed on campuses without opportunity for formal comment or negotiation, impedes campus' abilities to effectively prevent and address sexual assault.

**Question 3: In essence, universities are required to act as judge, jury, and executioner when some believe that their campus justice systems are poorly equipped to handle these types of cases. First, would you agree with this sentiment and, if so, can you provide examples from experiences at your own institution where the university was not best suited to investigate an alleged assault? And second, do you believe that investigations into reported campus sexual assaults are better handled by outside law enforcement that has more robust resources to conduct such investigations? I would welcome your thoughts on how the current process could be improved.**

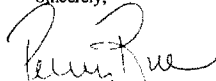
I do not agree that campus judicial systems are poorly equipped to handle allegations of sexual assault. In fact, I believe it is imperative for campuses to maintain control of the investigative and adjudication processes because these are specifically designed to be fair, prompt and equitable for all parties. Key to this process is the commitment to confidentiality of all parties involved in an allegation of sexual violence. Both the alleged victim and the accused are provided with an impartial advisor to help these individuals navigate the campus judicial process. Once a decision of responsibility is determined, campuses have established appeal processes to ensure that all parties are provided with the opportunity to have their cases reviewed. And given campus' responsibilities to ensure equal access to educational opportunity under federal law and regulation, colleges and universities share a deep interest in establishing processes that are fair and equitable for all parties involved. We must also acknowledge that, because of our responsibilities to all parties involved in an allegation of sexual violence, both the victim and the accused often find themselves dissatisfied with an outcome. The truth, however, is that colleges and universities have a long track record of well-trained staff to manage the campus judicial process. In my 35 years of experience as a higher education administrator, never have I doubted the importance of the campus conduct process in adjudicating a report of sexual violence. Campus processes are not courts of law, and I cannot stress enough the importance and necessity of this distinction given our unique ability to support victims while being fair to all parties. The notion that campuses act as judge, jury, and executioner seems out of context. If they choose, victims can report to local law enforcement. Further, higher education professionals already recognize that there may be cases, particularly involving repeat or violent offenders, where the best place for a resolution is in the court system. I must reiterate that some survivors of sexual violence may not want to report to local law enforcement. Instead, some may want to report on campus and/or receive campus-based support services. I must also reiterate that the criminal court system rarely finds an outcome that is either prompt or favorable to victims of sexual violence. Relying upon the court system would substantively hinder our shared interests, and campus' responsibilities, to address and prevent sexual violence.

Further, campuses do not handle sexual assaults in a vacuum. It is common practice to articulate an MOU with local law enforcement as one facet of a comprehensive protocol to support safe campus environments. But not all MOUs are created equal. For campuses that do not have such an arrangement, I urge discretion to better understand why such an agreement has not yet been arranged. Although campuses are deeply committed to partnerships that affirm safe, fair, and equitable processes, some proposals by local law enforcement, if implemented, would actually undermine those interests.

**Question 4: I have also heard concerns that institutions feel threatened by the prospect of harsh repercussions from the Department of Education's Office for Civil Rights if investigations into reported sexual assaults do not yield guilty verdicts. Have you felt the same pressures at your respective institution and do you believe that the specter of lost federal funding impacts institutions' decision making when investigating reported sexual assaults on campus?**

I have not encountered the sentiment that failure to yield a determination of responsibility on the part of the accused will automatically translate to harsh repercussions by the Department of Education's Office for Civil Rights. Instead, colleges and universities welcome the opportunity to improve processes through collaboration with the Office for Civil Rights. But when investigations by the Office for Civil Rights take 5 to 10 years to resolve, campuses often find themselves in the untenable position to wait for an outcome while trying to target improvements in conduct processes where they may be needed. Finally, I do find the sentiment troubling that professionals in the higher education community care more about institutional reputation than the safety and well-being of students. With more than three decades of experience, I have worked with countless professionals whose first instinct is to support and protect all students. And this sentiment is even more troubling today where mishandling an allegation of sexual violence yields the greater prospect for heavy public scrutiny on the institution. It is with unwavering confidence that I close by stating that campuses are deeply committed to the safety and well-being of all students and that our conduct processes are designed with this commitment at the top mind.

Sincerely,



Penny Rue, Ph.D.  
Vice President, Campus Life and Professor of Counseling  
Wake Forest University

# Dickinson

OFFICE OF GENERAL COUNSEL

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Carlisle, PA 17013-2896

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October 20, 2015

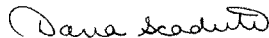
The Honorable Virginia Foxx  
Chairwoman  
Subcommittee on Higher Education and Workforce Training  
United States House of Representatives  
Washington, DC 20515

Dear Chairwoman Foxx:

Thank you for the follow up questions after the Subcommittee's September 20, 2015 hearing on *Preventing and Responding to Sexual Assault on College Campuses*. Please see the enclosed document for responses to the questions submitted by Congressman Byrne.

If you have any questions or require further follow up, please do not hesitate to contact me.

Respectfully submitted,



Dana Scaduto  
General Counsel

HEARING OF THE SUBCOMMITTEE ON HIGHER EDUCATION AND WORKFORCE TRAINING: "PREVENTING  
AND RESPONDING TO SEXUAL ASSAULT ON COLLEGE CAMPUSES"

ADDITIONAL QUESTIONS FOR THE HEARING RECORD

QUESTIONS SUBMITTED BY CONGRESSMAN BRADLEY BYRNE

RESPONSES BY DANA SCADUTO, ESQUIRE

SUBMITTED: OCTOBER 20, 2015

1. University officials have stressed to me and my staff that institutional disciplinary processes are designed to handle academic matters like plagiarism, not to investigate and adjudicate felony offenses like sexual assault. It appears that regulations mandating that institutions investigate these crimes themselves are effectively an unfunded mandate that drive institutions to hire outside experts to perform investigations. To this end, a recent study by Vanderbilt University found that institutions encounter significant costs to conduct investigations of alleged sexual misconduct and comply with Title IX. Moreover, it is clear that these costs directly contribute to the need for institutions to increase tuition.

Given our shared interest in reducing costs for students, do you agree that existing regulations run counter to the Department of Education's stated desire to limit college costs so that all qualified students can access a world-class education? If so, do you agree that alleged cases of sexual assault are better handled by law enforcement with the existing capacity to investigate and adjudicate these crimes?

*Colleges and universities are incurring significant additional expenses related to compliance with the array of federal and state laws, regulations and sub-regulatory guidance that address sexual violence including the Clery Act, the Violence Against Women Act (VAWA) and Title IX. Higher education is committed to safe campuses, to equitable treatment of all members of our campus communities and to compliance with the requirements that law makers and administrative agencies have put in place to help achieve these objectives. Colleges and universities are doing their best to meet these expectations but these efforts come at a cost – in both dollars and human capital. Compliance generally is complex and beyond the capacity of many campuses to tackle on their own. Please keep in mind that many, if not the majority of small institutions, do not have in-house counsel. Consequently, many institutions have had to engage lawyers and consultants to help them in their efforts, or struggle to handle the issues alone internally, often at the expense of other university programs and services.*

*Over the past several years, campuses have added violence prevention coordinators, Title IX coordinators, and investigators to their staffs. The requirements for Title IX coordinators are so specific that it is difficult for the person holding this position to have additional job responsibilities, a necessary construct within the administration on most smaller, less resourced, campuses where employees often fill multiple (non-conflicting) roles concurrently. Moreover, the expertise required to successfully fulfill the requirements of positions related to Title IX, VAWA and Clery compliance is leading campuses to hire individuals with specialized training, including lawyers, to fill what would traditionally be considered higher education administrative positions. A recent review of a career board advertising legal positions in higher education revealed that 25% of the postings were for positions related to Title IX and/or Clery compliance.*

*The expectations for those who will be involved in our resolution processes – as advisors, investigators and decision-makers – are so demanding and complex that it has left many institutions wondering how much and what types of training(s) will be sufficient to meet these expectations. Institutions are questioning whether the training of “volunteers” – the students, faculty and administrators who offer to serve in these various roles in institutional conduct processes – can ever be done to the satisfaction of the agencies that will be reviewing sexual violence situations.*

*This has resulted in many colleges and universities determining that the only way to meet legal and agency expectations is to bring expensive professional investigators and decision-makers onto our campuses and into the lives of our students, often escalating the tension and emotion of an already difficult situation. While engaging lawyers, retired judges, and sex crimes prosecutors may initially appear to “professionalize” decision-making, it changes the entire dynamic of campus processes. Decisions rendered by “outsiders” lack the benefit of being imposed by the campus communities involved. Finally, the services of such professionals are expensive. Sadly, the more external resources are engaged, the more the campus community is disempowered – perceived as unable to address unacceptable conduct on their own campuses. Under such conditions, college processes look far more like a substitute for a criminal proceeding than a campus disciplinary process and the resources that could have been used for student training and prevention activities must be redirected to comply with the training and staffing requirements that have been imposed on us or alternatively, those costs must be passed on to students by increasing the cost of their education.*

*The dilemma facing many campuses today is the confusion and lack of clarity in law and agency guidance about what role campus resolution systems are supposed to be fulfilling. Historically, there have been very clear distinctions between the objective of on-campus resolution of unacceptable behaviors and accountability to federal and state laws. Each has a different purpose – the former to maintain the standards and safety of the institution itself and the latter to maintain societal standards as enforced by the criminal and civil justice systems. It is the recent increase in the imposition of new and not-always-consistent standards for college campuses that is challenging the clarity of these roles. Going forward, it would be helpful if any new laws, regulations, and guidance in this area would clarify the separate and distinct roles of a campus disciplinary process versus the criminal/civil justice system*

*In addressing sexual violence, the role of colleges and universities is to enforce non-discrimination laws, including Title IX, not criminal statutes. We proceed irrespective of whether law enforcement is involved and investigating an assault or stalking allegation, for example, and regardless of the resolution in the criminal justice system. Yet, the requirements imposed over the last several years have set more court-like standards for reviewing claims, such as requiring that we open our proceedings to counsel and imposing detailed procedural requirements. Make no mistake, our campuses still expect to enforce expectations about student conduct involving everything from cheating to underage drinking to sexual assault. However, we are not courts nor should we be.*

*Colleges and universities have excelled in administering restorative justice, imposing sanctions and consequences that are intended to educate the offender and restore that person to our community in a productive manner. Sometimes, the behavior is so egregious that restoration is not possible and then we separate those persons from our communities. We do not pronounce guilt or innocence according to criminal standards. And we do not incarcerate. In short, we are not a substitute for the criminal justice system.*

*As citizens, victims and respondents have a Constitutional system of justice which is there for just such situations. Colleges can address the situations from the community safety and restorative justice perspectives, which is well within our wheelhouse as educators, and I believe we should continue to do so.*

**2. We all agree that it is essential to prevent sexual assaults on college campuses. However, both of your prepared testimonies discuss the multi-layered, and sometimes duplicative, regulations that universities are subject to as they investigate alleged sexual assaults. As I understand it, many of the existing regulations placed upon institutions have resulted from closed rulemaking processes that offered little or no opportunity for input from institutions. Do you have suggestions for ways to increase the efficiency of the system through which institutions investigate sexual assaults, and specifically, can you talk about the importance of institutional engagement in the development of such regulations?**

*There are various stakeholders in confronting and finding successful ways for addressing sexual violence on college campuses. Certainly, the perspectives of victims/survivors have a central role in these discussions. But so do the perspectives of institutions of higher education and law enforcement, among others. Higher education welcomes the opportunity to be part of the solution and to help craft solutions that work. American colleges and universities are very diverse – large, small, public, private, residential, commuter, for-profit, not-for-profit, religiously-affiliated, historically serving a particular race or ethnic group. There is rarely a single way of addressing a problem that will work effectively on every campus. Given the complexity of sexual violence, this statement has particular weight. Directives that don't anticipate differences or allow flexibility doom compliance from the outset. Moreover, administrators from colleges and universities provide significant expertise regarding how colleges and universities operate, as well as innovative and resourceful solutions.*

*Had those with such higher education expertise been invited into discussions about agency guidance before enhanced standards were set, good, candid, informed discussions might have led to clearer language and better solutions for addressing this most serious topic -- solutions that took into account the diversity of institutions of higher education that would be impacted by this guidance and the myriad ways those institutions can be effective in preventing and responding to sexual misconduct. If higher education had been at the table, we could have educated those setting guidance and lawmakers about what campus conduct systems can and cannot do, talked about what we do well (education and training) and discussed options, including closer collaboration with law enforcement.*

*Going forward, I hope that lawmakers and agency officials will seek input from a variety of perspectives that includes experts in higher education as you decide what, if any, additional steps need to be taken to change American culture around sexual behavior and sexual violence and what role higher education and others can play in what should be a multi-faceted, multi-dimensional approach to a complex issue.*

**3. Institutions from across the country, private and public, large and small, have expressed concern with the current system for investigating and adjudicating sexual assaults on college campuses. Specifically, institutions are expected to investigate reported assaults, render decisions, hear appeals and deliver punishments upon a finding of guilt. In essence, universities are required to act as judge, jury, and executioner when some believe that their campus justice systems are poorly equipped to handle these types of cases. First, would you agree with this sentiment and, if so, can you provide examples from experiences at your own institutions where the university was not best suited**

to investigate an alleged assault? And second, do you believe that investigations into reported campus sexual assaults are better handled by outside law enforcement that has more robust resources to conduct such investigations? I would welcome your thoughts on how the current process could be improved.

*My answer to this question is largely covered in my previous responses. Additionally, the current process could be improved by the following:*

1. *Creating safe harbors for colleges and universities that do not relieve us of accountability for failures to comply with the law or agency guidance but which provide us with certain presumptions of good faith when reviewing our compliance. For example, when we are applying OCR guidance, VAWA or Clery to decide whether to investigate despite a victim's objection or are trying to harmonize federal and state requirements, protect us from penalties and administrative action if we have acted reasonably and in good faith.*
2. *Clarifying that each institution may decide who sits on grievance and hearing boards and what procedures they use so long as the procedures are fair and designed not to advantage or disadvantage any student.*
3. *Clarifying that there is no binding standard of proof set by law to be used in making determinations of sexual misconduct. The only place such a standard appears is in agency guidance.<sup>1</sup>*
4. *Clarifying that guidance from OCR is merely guidance. Since it does not have the force of law, it should not be the compliance standard OCR requires institutions to meet when they otherwise provide a safe non-discriminatory educational environment.*
5. *Clarifying that lawmakers and agencies do not expect higher education to act as a substitute for the criminal justice system in responding to claims of sexual violence.*

4. I have also heard concerns that institutions feel threatened by the prospect of harsh repercussions from the Department of Education's Office of Civil Rights if investigations into reported sexual assaults do not yield guilty verdicts. Have you felt the same pressures at your respective institutions, and do you believe that the specter of lost federal funding impacts institutions' decision making when investigating reported sexual assaults on campus?

*There is widespread concern among institutions of higher education that the recent guidance and subsequent enforcement actions by the Department of Education's Office for Civil Rights, create significant challenges for colleges and universities and their obligations to treat all of their students in a fair and unbiased manner. While OCR guidance states that institutions must be "fair and equitable" in their investigation and campus resolution processes, there are procedural requirements in the guidance that complicate our ability to do so. For example, on smaller campuses, the imposition of interim sanctions before a decision on responsibility can be made may result in substantial detrimental consequences for an accused, such as being unable to complete a class or even to graduate on time.*

<sup>1</sup>The legislative history of the Violence Against Women Reauthorization Act of 2013 is instructive. Section 304 of the bill incorporated provisions of the Campus SaVE Act. While earlier drafts of the Campus SaVE bill required the use of a "preponderance of evidence" standard, this language was removed in the final version of the legislation passed by Congress and signed into law. Yet, despite Congress' decision not to prescribe a specific standard in law, OCR has, continued, through guidance to compel the use of this standard in all sexual violence proceedings, a standard imposed without any opportunity for notice or comment.

*Colleges and universities take the potential loss of federal funding seriously. However, that is not their only consideration. Institutions are committed to ensuring the integrity of our campus codes of conduct and disciplinary processes -- and the legitimacy of these campus systems is undermined when students do not feel that they have been treated fairly. As a seasoned colleague of mine who works in Student Affairs is known to say when discussing this dilemma, "We are the colleges of all of our students." We can and will do more to help change attitudes and provide information around sexual violence and to support those within our communities who may be victims of it. However, we must do so in a manner that assures fair and impartial review of claims and respects the integrity of all members of our community.*

[Whereupon, at 12:13 p.m., the subcommittee was adjourned.]

